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84-925

No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MARINE TRANSPORT CORP.,

*Petitioner,*

—v.—

JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

The court below was asked to decide petitioner's liability for pension contributions under a collective bargaining agreement which had already been the subject of extensive litigation before the National Labor Relations Board and the court of appeals. The dispute arose in 1976 when petitioner, a vessel owner, and a union disagreed about whether the union represented petitioner's employees. Petitioner refused to abide by a multiemployer collective bargaining agreement which would have covered all its employees. The NLRB dismissed the union's unfair labor practice charges, which alleged that petitioner was bound by the agreement, and decided that petitioner's employees, except those on two vessels, should hold an election to choose a labor union. In the election, the employees selected a new union. Afterward, the NLRB decided that petitioner's continued refusal to abide by the agreement was an unfair labor practice with respect to the employees on the two vessels. However, in *General Marine Transport Corp.* v. *NLRB*, 619 F.2d 180 (1980), the court of appeals held that the Board was incorrect since the six month statute of limitations applicable to unfair labor practices had expired with respect to petitioner's refusal to abide by the agreement. Petitioner never did abide by the agreement. This subsequent action by pension fund trustees presents the following questions:

1. Is this a case within the exclusive jurisdiction of the NLRB to remedy unfair labor practices and resolve representation disputes, and not a suit for "violation of contracts between an employer and a labor organization" within the district court's jurisdiction under LMRA § 301, 29 U.S.C. § 185?

2. Does the six month statute of limitations in 29 U.S.C. § 160(b) applicable to unfair labor practices, apply in a § 301 action that litigates the duty to honor a collective bargaining agreement, or is the court of appeals correct that the six month limitations rule announced in *Del Costello* v. *Teamsters*, 462

U.S. 151 (1983), applies only to hybrid § 301/fair representation cases?

3. Can an employer be liable under a collective bargaining agreement he has no duty to abide by under the National Labor Relations Act?

4. Are the due process and *ex post facto* clauses of the Constitution violated by imposing civil penalties under a statute enacted in 1980 for an employer's repudiation of a collective bargaining agreement in 1976?

5. If an employer does not commit an unfair labor practice by refusing to abide by a collective bargaining agreement, did Congress intend that the employer could nonetheless violate § 306 of the 1980 Multiemployer Pension Plan Amendments, 94 Stat. 1295, by refusing to make pension contributions under the agreement?

6. If employees elect a new labor union and become ineligible to participate further in pension and insurance trusts of the former union, does 29 U.S.C. § 186(c)(5) require that the contributions held in the former union's trust funds be transferred to a new trust for the benefit of those employees?

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JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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General Marine Transport Corp. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered July 20, 1984 and an order denying a petition for rehearing of said judgment containing a suggestion for rehearing *en banc* entered September 7, 1984. The court of appeals affirmed a district court judgment entered May 19, 1983, an order entered September 19, 1983 denying petitioner's motion to amend the judgment, as well as a supplemental judgment awarding attorneys' fees entered February 21, 1984 by the United States District Court for the Southern District of New York in favor of respondents.

## CITATION TO OPINION BELOW

The opinion of the court of appeals is reported at 740 F.2d 160 and is set out in the Appendix (A1). The order of the court of appeals denying the petition for rehearing is unreported and is set out in the Appendix (A71). The opinions of the district court are reported at 534 F. Supp. 120 (A26) (granting respondents partial summary judgment), 564 F.Supp. 1064 (A42) (awarding damages and dismissing petitioner's counterclaim) and 578 F. Supp. 72 (A60) (denying petitioner's motion to amend the judgment). Each opinion is set out in the Appendix. The opinion of the district court awarding attorney's fees is unreported and is set out in the Appendix (A63).

Also set out in the Appendix is the opinion of the Court of Appeals in the related unfair labor practice case, reported at 619 F.2d 180 (A76). The opinion of the National Labor Relations Board in that case is reported at 238 N.L.R.B. 1372, and is set out in the Appendix (A99). The related opinion of the National Labor Relations Board in the representation case is unreported and is set out in the Appendix (A122).

## JURISDICTION

The judgment of the court of appeals was entered on July 20, 1984. Following this judgment, petitioner filed a timely petition for rehearing containing suggestions for rehearing *en banc*. On September 7, 1984, the court of appeals denied the petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions and federal statutes:

(a) U.S. Constitution, Art. 1, § 9, Clause 3

> No Bill of Attainder or ex post facto Law shall be passed.

(b) U.S. Constitution, Amendment V

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

(c) 29 U.S.C. § 185(a)

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(d) 29 U.S.C. § 186

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> > (1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

* * * * *

(c) The provisions of this section shall not be applicable

* * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death

of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund.

* * * * *

(e) 29 U.S.C. § 158

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

(f) 29 U.S.C. § 160

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:

* * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made,

(g) Multiemployer Pension Plan Amendments Act of 1980, § 306 (94 Stat. 1295) (29 U.S.C. §§ 1132(g)(2), 1145)

SEC. 306. LIQUIDATED DAMAGES WITH RESPECT TO DELINQUENT CONTRIBUTIONS

(a) Part 5 of subtitle B of title I is amended by adding after section 514 the following new section:

"DELINQUENT CONTRIBUTIONS

"SEC. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law,

make such contributions in accordance with the terms and conditions of such plan or such agreement."

(b) Section 502 is amended by—

(1) redesignating subsection (b)(1) and (2) as subsection (b)(1) (A) and (B), and adding at the end thereof the following new paragraph:

"(2) The Secretary shall not initiate an action to enforce section 515";

(2) redesignating subsection (g) as paragraph (1) of such subsection and inserting "(other than an action described in paragraph (2))" between "title" and "by" in such redesignated paragraph (1), and adding at the end thereof the following new paragraph:

"(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

"(A) the unpaid contributions,

"(B) interest on the unpaid contributions,

"(C) an amount equal to the greater of—

"(i) interest on the unpaid contributions, or

"(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

"(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

"(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954."

(h) Multiemployer Pension Plan Amendments Act of 1980, § 108(a)(1) (94 Stat. 1267)

"Except as provided in paragraphs (2), (3) and (4), the amendments to this Act made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on the date of the enactment of that Act."

## STATEMENT OF THE CASE

This petition is the most recent round in a much litigated dispute between General Marine Transport Corp. ("petitioner"), the operator of two vessels which dispose of sewage sludge in New York Harbor, and Local 333, United Marine Division, International Longshoreman's Association ("Local 333"), a union which at one time represented petitioner's employees. Respondents invoked the jurisdiction of the district court under the Labor Management Relations Act § 301, 29 U.S.C. § 185 ("§ 301" or "LMRA § 301"). For its counterclaim, petitioner invoked the jurisdiction of the district court under LMRA § 302, 29 U.S.C. § 186 and 28 U.S.C. §§ 1331 and 1337. The case was decided on cross-motions for summary judgment and all factual inferences should be made in favor of petitioner.

At issue here are pension and insurance trust fund payments ("Fund payments") allegedly due from petitioner under a disputed collective bargaining agreement covering the period 1976-1979 (the "Agreement"). Petitioner refused to abide by the Agreement because it covered employees the union did not represent. In previous litigation, the court of appeals set aside

a NLRB decision and held that petitioner had no duty under the National Labor Relations Act ("NLRA") to abide by the Agreement. *General Marine Transport Corp.* v. *NLRB*, 619 F.2d 180 (2d Cir. 1980). Petitioner is now appealing a subsequent decision by a different panel of the court of appeals, holding that petitioner nonetheless owes Fund payments under that Agreement based on LMRA § 301. In addition, petitioner appeals the decision below to include a double interest penalty and attorneys' fees—a total award ($314,000) four times compensatory damages. The district court based its authority to assess these penal damages on a statute passed in 1980, four years after this dispute arose. Finally, petitioner appeals the circuit court's decision to dismiss petitioner's counterclaim to transfer payments petitioner made to Local 333's trust funds during the period 1973-1976. The transferred funds ($200,000) would cover employees the NLRB, in 1976, included in a bargaining unit ineligible to participate in the trust. These employees were expelled from Local 333 after they voted for a different union and will never be entitled to benefits unless the funds are transferred.

The dispute arose in 1976, during collective bargaining between Local 333 and the Marine Towing & Transportation Industry Employees Association (the "Association"), a multi-employer bargaining unit representing many shipping companies operating in the Port of New York. In 1976, petitioner authorized the Association to negotiate on its behalf a contract with Local 333 covering the employees on petitioner's only vessel, the sludge vessel "Susan Frank". (Petitioner later acquired a second sludge vessel.) The Association instead signed a three-year Agreement to take effect April 1, 1976, purporting to cover the employees on some fifteen vessels, the sludge vessel and all those operated by two other companies affiliated with petitioner: Berman Enterprises Inc. ("Berman") and Standard Tank Cleaning Corp. ("Standard"). Petitioner, Berman and Standard are all owned by the Berman family. However, Berman's and Standard's employees, unlike petitioner's, were not members of Local 333. In addition, most Local 333

members employed by petitioner worked on the vessels of petitioner's affiliates, side by side with non-Local 333 members.

On April 13, 1976, petitioner repudiated the Agreement, objecting to the attempt to cover its employees who worked on the affiliates' vessels, as well as the attempt to cover the affiliates' employees. Petitioner also objected to a clause which would have required it to cease doing business with a customer who operated unmanned barges. When Local 333 members on the sludge vessel struck, petitioner replaced them with non-union employees and members of a rival union, the Marine Engineer Beneficial Association ("MEBA"). The MEBA had been organizing the employees of petitioner and its affiliates. Petitioner provided these employees with a health insurance plan and never abided by the Agreement on the sludge vessels or any other vessels.

As a result of petitioner's refusal to abide by the Agreement, Local 333 pressed four unfair labor practice complaints against petitioner and affiliates between April and August 1976. None led to an unfair labor practice charge. The NLRB decided that petitioner and affiliates rightfully refused to abide by the Agreement. Specifically, the NLRB held that the Agreement had attempted to encompass employees not in the bargaining unit, and that the unmanned barge clause amounted to an illegal "hot cargo" agreement. (A79-81) In addition, as a result of MEBA's interest in representing the employees, the NLRB held representation hearings and conducted an election. The NLRB excluded only petitioner's employees on the sludge vessels on the grounds that the Agreement constituted a "contract bar" to their participation.

The election was held and the employees chose Local 333's rival, MEBA, to represent them. After losing the election, Local 333 expelled petitioner's employees who participated in the election. The NLRB certified the election results on January 20, 1977.

In February 1977, Local 333 again filed unfair labor practice charges with the NLRB, claiming that petitioner's continued

refusal to abide by the Agreement for the employees on its two sludge vessels was an unfair labor practice now that the election was over. In September 1978, the NLRB sided with Local 333, holding that Local 333's demands to enforce the Agreement only with respect to the two sludge vessels constituted "fresh demands" that should be honored. The NLRB held that petitioner had violated its duty to bargain with the union under NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5), by refusing to abide by the Agreement. In December 1978, respondents, trustees of Local 333-Association trust funds, started this § 301 action to collect payments allegedly due under the Agreement.

However, in March 1980, the court of appeals set aside the unfair labor practice charge, holding it was barred by the six month statute of limitations in 29 U.S.C. § 160(b) because it was filed a year after petitioner repudiated the Agreement. 619 F.2d 180. There seems to be no dispute that this earlier decision determines that petitioner had no duty under the NLRA to honor the union's demands to abide by the Agreement, even when limited to the two sludge vessels, once six months after the April 1976 repudiation had passed.

In December 1981, the district court decided this case on summary judgment and held that petitioner was bound by the Agreement to make Fund payments for employees on the sludge vessels. The court held a six year, rather than a six month, statute of limitations applied in the § 301 action. The district court refused to recognize the court of appeals decision as *res judicata* or collateral estoppel, notwithstanding the holding that petitioner's refusal to honor the Agreement did not violate the duty to bargain with the union. On top of that, the district court awarded respondents penalties and attorneys' fees amounting to four times compensatory damages under a statute enacted in September 1980—four years after the Agreement's term began, more than one year after its expiration, and several years after respondents' action was filed.

In July 1984, the court of appeals affirmed the district court's decision. Petitioner seeks the grant of a writ of certiorari to the court of appeals.

## REASONS FOR GRANTING THE WRIT

### I.

### THE CIRCUITS CONFLICT ABOUT DISTRICT COURT JURISDICTION TO DECIDE CASES IN WHICH THE EXISTENCE OF A COLLECTIVE BARGAINING AGREEMENT IS IN DISPUTE.

The writ should be granted because the limits of district court jurisdiction under § 301 to enforce a collective bargaining agreement is an important subject about which the circuits conflict. *See Teamsters* v. *California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982), *cert. denied*, 53 U.S.L.W. 3263 (Oct. 9, 1984) (dissenting opinion); *Carpenters* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983); *Electrical Workers* v. *Iowa Electric Light and Power Co.*, 668 F.2d 413 (8th Cir. 1982). This case shows that the wider conflict between the circuits, which the dissenting justices in *California Consolidators* feared, is occurring. In addition, the jurisdiction of the NLRB to resolve representational and unfair labor practice disputes relating to collective bargaining is undermined by conflicting decisions in § 301 suits, such as the decision in this case.

This case is a good one in which to consider § 301 jurisdiction because the controversy was extensively litigated before the NLRB. The NLRB Regional Director dismissed unfair labor practice charges filed by the union and the NLRB General Counsel affirmed. The NLRB held representation hearings and an election under NLRA § 9, 29 U.S.C. § 159, to resolve questions of representation and conducted an unfair labor practice proceeding under NLRA § 10, 29 U.S.C. § 160, to litigate whether petitioner had a duty under NLRA § 8, 29

U.S.C. § 158, to abide by the contract after the election. Unlike the decisions in which this Court has denied certiorari, here we know that the litigation in the district court produced a result the opposite of the result in NLRB proceedings. The interference with NLRB jurisdiction is real and actual in this case.

A major problem with the decisions of the courts of appeal in these kinds of cases is the absence of any rule or standard to determine the jurisdictional question. Here, the court of appeals concluded that the district court did not exceed its jurisdiction under § 301 to hear a breach of contract suit because the district court *said* this was a contract case and not a collective bargaining dispute:

> "the district court explicitly held there *was* a valid contract between the parties and that General Marine attempted to repudiate the contract . . . The court therefore did not order the execution of a labor contract, a remedy that concededly lies exclusively within the enforcement power of the National Labor Relations Board." (A9)

However, this is a tautology: the result rationalizes the result. Clearly, the district court and the court of appeals could not find a contract in this case based upon the terms of the contract; § 301 jurisdiction does not exist simply by claiming a contract exists. The court should have considered whether the *facts* presented a dispute that should be resolved under NLRA § 8, 29 U.S.C. § 158—based on the duty to bargain and enter into a contract—or could be resolved solely under the terms of the contract itself. *Accord Electrical Workers* v. *Iowa Electric Light and Power Co.*, 668 F.2d at 419, in which the Eighth Circuit drew the line "between those cases where the district court has jurisdiction under Section 301 and those in which it does not" by "examining the major issues to be decided as to whether they can be characterized as primarily representational or primarily contractual." *Kaiser Steel Corp.* v. *Mullens*, 455 U.S. 72, 83 ("federal courts do not have jurisdiction over

activity which 'is arguably subject to § 7 or § 8 of the [NLRA]' "). The writ should be granted to resolve the conflict between the circuits and decide this question of great importance in delineating the roles of district courts and the NLRB in hearing labor disputes.

## II.

## THE DUTY TO ABIDE BY A COLLECTIVE BARGAINING AGREEMENT SHOULD BE TIME-BARRED IN SECTION 301 ACTIONS IF IT IS TIME-BARRED IN UNFAIR LABOR PRACTICE PROCEEDINGS; THE COURT OF APPEALS APPLIED *DEL COSTELLO* V. *TEAMSTERS* TOO NARROWLY.

The writ should be granted to establish that *Del Costello* v. *Teamsters*, 462 U.S 151 (1983), is not limited to a particular kind of lawsuit. The six month statute of limitations in 29 U.S.C. § 160(b) should apply to any § 301 claim that is based upon a duty derived from the National Labor Relations Act, such as the duty to abide by a multiemployer collective bargaining agreement. Uniformity between district courts and the NLRB is essential to prevent forum shopping and relitigation of disputes, as well as to protect the employer's ability to bargain. An employer with no duty to honor a labor contact under 29 U.S.C. § 158 cannot effectively fulfill his duty under that statute to bargain with his employees for a mutually agreeable alternative agreement in the face of a conflicting § 301 contractual liability.

In a system in which both courts and an administrative agency hear labor disputes, the result should not depend upon the forum. The court of appeals conceded that *General Marine*, 619 F.2d 180, establishes that the six month statute of limitations in 29 U.S.C. § 160(b) time-bars any unfair labor practice claim derived from the employer's refusal to abide by the contract (A12). That conclusion should have barred respondents' claim. Instead, the court of appeals decided that

*Del Costello* v. *Teamsters*—in which 29 U.S.C. § 160(b) was applied in a § 301 action—is limited to "hybrid section 301/unfair representation cases" since:

> "they closely resemble employees unfair labor practice actions which are governed by that limitations period . . . and cannot reasonably be expanded to all section 301 claims that involve facts which might also have established unfair labor practice charges." (A12)

However, the facts in this case do not simply *resemble* those which might have established an unfair labor practice action. The facts underlying the district court's decision are *identical* to those underlying the NLRB's unfair labor practice decision—the one the court of appeals reversed:

> "In this case the district court applied those [NLRA] principles correctly; indeed it reached the same conclusion on the same reasoning as the Board did in the order that was vacated in this court on statute of limitations grounds." (A15)

The statute of limitations should be the same whether an action is brought as an unfair labor practice or a § 301 action. Indeed, the six month limitations period applies better in this case than in the hybrid § 301/fair representation situation found in *Del Costello*. In the latter circumstance, the unfair representation claim against the union derived from the NLRA, but the claim against the employer involved a simple breach of contract with no NLRA implications. In contrast, in this case the § 301 claim against the employer derives from the NLRA as well. It comes from the duty to abide by a collective bargaining agreement negotiated by a multiemployer association, a duty litigated and developed in actions before the NLRB. *E.g. Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404 (1982) (bargaining impasse is not a sufficient reason to withdraw from multiemployer bargaining); *NLRB* v. *Siebler Heating & Air Conditioning, Inc.*, 563 F.2d 366 (8th Cir. 1977), *cert. denied*, 437 U.S. 911 (1978) (multiem-

ployer association's failure to provide fair representation means employer not bound by collective bargaining agreement). The writ should be granted to establish that *Del Costello* stands for a uniform six month statute of limitations in any § 301 case in which the claim is based upon the NLRA. This will eliminate forum shopping, relitigation of disputes, and minimize the potential for imposing conflicting obligations on employers.

## III.

## AN EMPLOYER SHOULD NOT BE LIABLE UNDER A COLLECTIVE BARGAINING AGREEMENT HE HAS NO DUTY TO HONOR UNDER THE NATIONAL LABOR RELATIONS ACT; THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The writ should be granted to establish that an employer's duty to bargain under 29 U.S.C. § 158 determines whether he is obligated to abide by a collective bargaining agreement in a § 301 action. The decision below is in direct conflict with *Garment Workers* v. *NLRB*, 366 U.S. 731 (1960). In that unfair labor practice case, this Court held that when the union does not represent a majority of the employees, the entire contract is unenforceable, even with respect to employees the union might properly represent. 366 U.S. at 737-38.

The decision below also conflicts with decisions of other courts of appeals which hold that when an unfair labor practice case establishes there is no duty to abide by a contract, a § 301 action cannot come to a contrary conclusion. *Carpenters* v. *Stevens*, 743 F.2d 1271 (9th Cir. 1984) (NLRB Regional Director's dismissal of unfair labor practice charges precludes § 301 action to enforce arbitrator's award imposing contractual liability); *Local 7-210* v. *Union Tank Car Co.*, 475 F.2d 194 (7th Cir. 1973), *cert. denied*, 414 U.S. 875 (1973).

In this case, the NLRB Regional Director and General Counsel specifically held that petitioner's refusal to abide by the collective bargaining agreement was not an unlawful re-

fusal to bargain, citing *B&B Industries, Inc.*, 162 N.L.R.B. 633 (1967) (A79-80). The NLRB's dismissal of the charges here followed well established policy, first announced in *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945). The rule is that an employer, faced with a question of representation, may not execute or bargain for a contract with either the incumbent or a rival union. Furthermore, the court of appeals in *General Marine Transport Corp.* v. *NLRB* decided that petitioner had no duty to abide by the collective bargaining agreement after the election.

The prior litigation should have determined that petitioner had no contractual liability for pension fund contributions. The duty to bargain collectively includes "the negotiation of an agreement, or any question arising thereunder, *and the execution of a written contract* . . . .", 29 U.S.C. § 158(d) (emphasis added). If the NLRB determines that the employer has no duty to abide by the terms of a collective bargaining agreement, then the employer and union know that their obligations are to bargain for another, mutually agreeable contract. If pension fund trustees in a § 301 action can enforce an agreement the employer has no duty to honor under 29 U.S.C. § 158, the employer will not be able to fulfill his statutory duty to bargain with the union for a different contract. *Cf. American Commercial Barge Lines Co.* v. *SIU*, 730 F.2d 327, 335-37 (5th Cir. 1984) (NLRB has primary jurisdiction to consider employer's refusal to make pension contributions).

The court of appeals disregarded the direct connection between the duty to bargain and the duty to abide by a specific collective bargaining agreement defined in 29 U.S.C. § 158(d)—and the obvious benefit of consistency—for the stated goal of protecting "employees clearly represented by Local 333 whose pensions are at issue here" (A17). However, if the court was carving an exception from the rules to protect employees, it carved in the wrong place. By disregarding the rules announced in *Garment Workers*, and *Midwest Piping*, the court of appeals protects no one. Petitioner never followed the contract—a decision the court of appeals upheld in the prior

decision—and Local 333 members were never more than a minority on the sludge vessels. The employees for whom contributions are claimed will not accumulate sufficient pension credits to obtain benefits; they will never see a penny of the money.

Moreover, the judgment—four times the contributions payable if the Agreement had been followed—deprives the employer of a considerable amount of money that could otherwise have provided pensions its employees would actually receive. In essence, the liability imposed is a penalty on both the employer and employees for resolving representation disputes and unfair labor practices before the NLRB, rather than capitulating to the demands of a union the employees did not want. The duty to bargain under 29 U.S.C. § 158 should govern the existence of a contract for purposes of a § 301 action. The writ should be granted to establish this principle.

## IV.

## CONGRESS DID NOT INTEND AN EMPLOYER TO VIOLATE A 1980 STATUTE BY REPUDIATING A CONTRACT IN 1976 OR TO PENALIZE LAWFUL COLLECTIVE BARGAINING; THE COURT SHOULD CLARIFY MPPA § 306 TO ELIMINATE CONFLICT WITH THE NLRA.

The judgment holds that petitioner violated § 306 of the 1980 Multiemployer Pension Plan Amendments Act ("MPPA"), 94 Stat. 1295, 29 U.S.C. §§ 1132(g) and 1145 (A72-73). In *Kaiser Steel Corp.* v. *Mullens*, 455 U.S. at 87-9, this Court expressed doubt that § 306 applied retroactively, but did not decide the question. Section 306 imposes double interest and attorneys' fees on an employer who fails to pay pension fund contributions due under a collective bargaining agreement. By enforcing § 306 against petitioner, the court of appeals, in effect, holds that petitioner violated federal law by refusing to abide by a collective bargaining agreement, even though the refusal was a legitimate response under the NLRA to the union's demands.

The Court should grant the writ, first, to decide whether the retroactive application of statutory penalties in a civil action runs afoul of the due process and *ex post facto* clauses of the Constitution. The Court has not previously reviewed this question. The notice to employers present in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 104 S. Ct. 2709 (1984), does not exist when the new statute is applied to conduct taking place four and one-half years before § 306 was enacted. Nor is there any Congressional intent to apply § 306 retroactively as there was in the *Pension Benefit* case. *See* MPPA § 108(a)(1), 94 Stat. 1267 (statute effective on date of enactment unless specified otherwise). The award exceeds compensatory damages fourfold. The resulting penalty is a clear violation of constitutional rights that should be rectified.

Second, the Court should grant this writ to clarify § 306 and eliminate conflict between it and the NLRA. Congress limited § 306 so that it would apply "to the extent not inconsistent with law." Petitioner's refusal to abide by the agreement was a proper, lawful response to the union's demands, as the proceedings before the NLRB and court of appeals show. Petitioner was entitled to persist in its position and require the union to engage in bargaining for a different contract. 29 U.S.C. § 158(d) (the obligation to bargain "does not compel either party to agree to a proposal"). This Court should establish that an employer's NLRA-sanctioned refusal to execute or abide by a collective bargaining agreement does not violate § 306. To conclude otherwise would interfere with rights guaranteed by the NLRA. The "to the extent not inconsistent with law" language in § 306 is aimed at this problem. *Kaiser Steel Corp.* v. *Mullens*, *supra*. Congress did not intend to reduce or discourage collective bargaining or the exercise of rights under the NLRA when it passed legislation requiring the prompt payment of pension contributions.

## V.

## SUBSTANTIAL MONIES CONTRIBUTED BY THE EMPLOYER FOR THE BENEFIT OF EMPLOYEES WILL BE LOST TO THEM UNLESS THE WRIT IS GRANTED; NO GROUP SHOULD BE DENIED A REMEDY UNDER 29 U.S.C. § 186(C)(5) BECAUSE THEY ARE FEW IN NUMBER.

The NLRB placed most of petitioner's employees in a separate bargaining unit not covered by Local 333 multiemployer agreements. The employees elected a different union, MEBA, to represent them. Petitioner previously made contributions ($200,000) to the Local 333 trust funds for them. Under 29 U.S.C. §186(c)(5), the contributions petitioner made should be administered for the benefit of the employees. In *Local 50 Health Benefit Fund* v. *Local 3 Welfare Fund*, 733 F.2d 229 (2d Cir. 1984), the court of appeals held that 29 U.S.C. § 186(c)(5) requires partition of trust fund contributions when employees choose a different labor union. *See also Alvares* v. *Erickson*, 514 F.2d 158 (9th Cir., 1975), *cert. denied*, 423 U.S. 874 (1975). Before this landmark decision, employees saw pension monies vanish when labor unions changed or employers reorganized. This decision offered a flexible remedy that ERISA and the 1980 Multiemployer Pension Fund Amendments Act, with rigid statutory requirements, cannot provide. This is a case in point. The pension statutes do not protect petitioner's employees; a partition under 29 U.S.C. § 186(c)(5) would.

Unfortunately for petitioner's employees, the district court dismissed petitioner's counterclaim and the court of appeals affirmed. It distinguished the earlier decision by a different panel in the *Local 50* case to a situation in which:

> "all of the employers and employees . . . have left a fund *en masse* creating a great distortion in the organization and financing of the funds." (A24).

However, as a practical matter, none of petitioner's employees are eligible to participate in Local 333's trusts. To do so, they would have to be Local 333 members working under a Local 333 agreement. Since 1976, none of petitioners' employees have met these conditions. Requiring petitioner to pay quadruple compensation into the Local 333 trust will benefit someone's employees, but not those of petitioner.

The appeals court decision works a great injustice on petitioner and its employees in the separate bargaining unit. When they participated in the NLRB representation hearing, all were told that the NLRA guaranteed that no harm would come from voting for the union of their choice. The employees work for the same employer and on the same vessels as before the election. Yet they are no longer eligible to participate in the Local 333 trust funds despite all the contributions made on their behalf.

Finally, the court of appeals apparently feels it would be cumbersome to partition funds for relatively small employee groups, as that involved here. But no group of employees should be deprived of monies contributed for their benefit just because they are few in number. This Court should grant the writ to establish that 29 U.S.C. § 186(c)(5) requires district courts to grant equitable relief when groups of employees withdraw from multiemployer trust funds, just as a court would grant such relief when a partnerhsip or any other joint venture dissolves.

## CONCLUSION

For the reasons stated above, petitioner asks the Court to grant the petition and issue a writ of certiorari to the court of appeals.

Respectfully submitted,

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Dated: New York, New York
December 6, 1984

# APPENDIX

**Opinion of the Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1353—August Term, 1983

(Argued June 4, 1984 Decided July 20, 1984)

Docket No. 83-7848

JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the New York Marine Towing & Transportation Industry Pension Fund and Insurance Fund,

*Appellees,*

—v.—

GENERAL MARINE TRANSPORT CORP.,

*Appellant.*

Before:

OAKES and NEWMAN, *Circuit Judges,*
and MISHLER, *District Judge.**

* Of the Eastern District of New York, sitting by designation.

Appeal from a number of related orders and opinions of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, granting summary judgment for plaintiff Pension and Insurance Funds trustees and against defendant employer. The court awarded the Funds damages for delinquent contributions found to be owed by the employer pursuant to § 301 of LMRA, 29 U.S.C. § 185, and § 502 of ERISA, 29 U.S.C. § 1132.

Affirmed.

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JARED STAMELL, New York, NY, *for Appellant*.

SEYMOUR M. WALDMAN, New York, NY (Roman Beck, Beck, Halberg & Williamson, New York, NY; Vladeck, Waldman, Elias & Engelhard, P.C., New York, NY, of counsel), *for Appellees*.

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OAKES, *Circuit Judge*:

This is an appeal from a number of orders of the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, granting summary judgment for trustees of employee benefit pension and insurance funds and assessing damages against an employer for delinquent contributions. In essence, the court held that the trustees were owed the money, along with a double interest penalty and attorney's fees. We affirm.

The four unpublished decisions appealed from represent the most recent phase of what appears to be an endless dispute between General Marine Transport Corp. (General Marine), the owner of sludge vessels used to dispose of sewage sludge which work in the Port of New York, and the union which represents, or purports to represent, its employees, Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO (Local 333). The rights and duties of the various parties to this dispute have been extensively litigated—before the National Labor Relations Board (the Board or the NLRB), a number of times before Judge Sweet, and twice recently in this court. *See Berman Enterprises Inc. v. Local 333*, 644 F.2d 930 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981); *General Marine Transport Corp. v. NLRB*, 619 F.2d 180 (2d Cir. 1980). We assume familiarity with our previous decisions.

At issue in this case are pension and insurance trust fund payments (Fund payments) allegedly due from the employer pursuant to a collective bargaining agreement covering the period 1976-79 (the Agreement). The Agreement was between Local 333 and the Marine Towing & Transportation Industry Employees Association (the Association), an association representing shipping companies in the towing and transportation industry in the Port of New York in a multi-employer bargaining unit. Since the 1950s the collective agreements have provided for both a Pension Fund and an Insurance Fund, and since 1962 General Marine has been a member of the Association and a Fund participant.

The focus of this litigation is General Marine's contention that it withdrew from the Association after the 1976 Agreement was reached and that it therefore is not obliged to make Fund payments to the trustees pursuant

to the Agreement. This issue of the validity of General Marine's attempted withdrawal from the Association in 1976 was litigated but not reached in *General Marine Transport*, 619 F.2d 180 (holding unfair labor practice charge against employer barred by statute of limitations). The district court held, as the Board had held before it, that General Marine was a party to the Agreement and that its purported withdrawal from the Association was invalid; it therefore held that the employer owed the trustees the Fund payments in question. In so holding, the court also ruled on a number of preliminary contentions raised by General Marine: that the district court had subject matter jurisdiction over this action, that the action was not barred by res judicata, that the suit was not barred by the statute of limitations, and that the suit was not barred because the trustees failed to exhaust their administrative remedies. In a separate opinion the court calculated damages in a manner challenged by General Marine, and also, on cross motions for summary judgment, dismissed General Marine's counterclaim having to do with certain related Fund payments made by General Marine to the Fund. We affirm the district court's opinion in all respects.

## *Facts*

The relevant history of the bargaining between the parties is set out in *Berman Enterprises*, 644 F.2d at 932-34. Briefly put, in 1976 General Marine's president, Evelyn Berman Frank, signed a written form authorizing the Association to bargain with Local 333 on General Marine's behalf, as it had since 1962. In the course of the negotiations, Local 333 proposed, and the Association accepted, two contract provisions authorizing practices

which General Marine had in the past found objectionable, so-called "vegetable oil" and "subsidiaries and affiliates" clauses.[1] Although given a chance by Local 333 and the Association to withdraw from the Association because of these clauses, General Marine chose to remain in the Association. The Agreement was signed on March 26, 1976, and became effective on April 1.[2]

On April 13, 1976, General Marine notified the Association and Local 333 that it did not consider itself bound by the Agreement because the contract exceeded the authority of the Association to negotiate on its behalf. In particular, General Marine objected to the "vegetable oil" and the "subsidiaries and affiliates" clauses. As of April 1, General Marine stopped making contributions to either the Insurance or the Pension Fund for its employees.

The dispute about the "subsidiaries and affiliates" clause, which is relevant to the counterclaim and to one of General Marine's substantive defenses, involves a long-standing argument between General Marine and Local 333 concerning the employees covered by the 1973-76 agreement. General Marine is one of three subsidiary

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1 Before 1976, Local 333 had sought to require General Marine and a number of other affiliated companies to cease towing certain unmanned barges carrying animal, vegetable or fish oil. The employers resisted, and the question was eventually litigated, with General Marine obtaining a favorable result. *See Berman Enterprises*, 644 F.2d at 932-33. The "vegetable oil" clause at issue here presented another attempt by Local 333 to impose this limitation on General Marine. The "subsidiaries and affiliates" clause requires affiliates of Association members to operate under the terms of the contract. The clauses are reprinted at *id.* nn. 3, 4.

2 The Agreement was signed by a representative of Local 333 on behalf of the employees and a representative of the Association on behalf of the participating employers. Individual employers did not sign the Agreement, though their names were listed at the bottom of the Agreement.

companies, along with Berman and Standard Tank, which operate barges in New York harbor and which are all owned by the Berman family. Only General Marine employees were explicitly covered by the Association-Local 333 agreements. The situation was complicated, however, by the Berman family's practice of having employees on the payroll of one affiliate work from time to time aboard vessels owned by another affiliate. When General Marine employees worked aboard Berman vessels, their employer treated them as were subject to the salary and other provisions of a contract covering Berman, rather than General Marine employees, but General Marine made payments to the Funds on their behalf as dictated by the agreement with Local 333.

Local 333 sought to have all Berman family employees, or, failing that, at least all employees on General Marine's payroll, determined to be members of Local 333 and bound by the Agreement. The issue was litigated before the Board, and General Marine obtained favorable results. In particular, it was determined that Berman employees were not covered by the Agreement, and that there was no "contract bar" preventing the Berman employees and the General Marine employees working on Berman vessels from holding an election to choose a bargaining representative. An election was held, and the employees in question chose to be represented by a non-Local 333 union, the Marine Engineers Beneficial Association (MEBA). These employees were then expelled from Local 333. Questions involving the representational status of all Berman family employees were, or at least should have been, resolved.

After the representational questions had been resolved, Local 333 filed unfair labor practices charges with the Board concerning General Marine's repudiation of the

Agreement as regards General Marine employees working on General Marine vessels—the only employees whom the Board found were members of Local 333. The Board held that General Marine was bound by the Agreement as regarded these employees and had therefore committed an unfair labor practice by attempting to repudiate it. This court then denied enforcement of the Board order, on the procedural ground that the union had not filed the charge within the six-month statute of limitations of section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b) (1982). *General Marine Transport Corp.*, 619 F.2d 180. The trustees were not parties to that action.

Subsequently, General Marine and its affiliates sued the Association, many of its members, Local 333, and the trustees, in federal district court, asserting that the Agreement, and in particular the "vegetable oil" and "subsidiaries and affiliates" clauses were illegal and constituted a group boycott in violation of the antitrust laws. The trustees counterclaimed to recover the Fund payments at issue here, but before trial the claims against the trustees were voluntarily dismissed, and the counterclaim was dismissed and subsequently reasserted in the separate complaint which was litigated below. A jury resolved the antitrust suit in favor of the defendants, a verdict which was upheld on appeal. *Berman Enterprises*, 644 F.2d 930.

The present suit, evolving from the counterclaim in the antitrust suit, sought recovery of the unpaid Fund contributions due for the General Marine employees working on General Marine vessels, including interest and attorney's fees pursuant to section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132. General Marine counterclaimed seeking repayment to it or to a receiver for certain funds paid to the

trustees in the 1973-76 period for the General Marine employees who worked on Berman vessels who, after the 1976 representation election was held, chose to join the MEBA.

The suit was litigated in five stages and resulted in four unpublished decisions. Initially the court on cross motions for summary judgment ruled that General Marine was liable for the unpaid contributions. A separate damages trial was then held, at which time the court granted the trustees' motion to dismiss the counterclaim. The court awarded the trustees $87,903.46 in pension and health insurance contributions, and $154,404.98 in double interest. Next General Marine moved to have the first decision reconsidered in light of *DelCostello v. Teamsters*, 103 S. Ct. 2281 (1983), arguing that in light of that decision the suit should have been dismissed as time barred. The court reconsidered its decision but held that the six month statute of limitations the Court held applicable in *DelCostello* did not apply in this instance. Finally the court awarded $71,694.37 in attorney's fees and costs to the trustees as prescribed by ERISA.

On appeal General Marine challenges each one of the district court's determinations. We will address each of its objections, dealing first with its jurisdictional and procedural objections, then with its objections as to the finding of liability and the assessment of damages and attorney's fees, and finally to its objections to the court's dismissal of the counterclaim.

## *Discussion*

*Jurisdiction.* General Marine asserts that the district court lacked jurisdiction to decide the question whether General Marine was a party to the Agreement. It argues

that the district court found that it never entered into a contract, and that in the absence of such a contract the court lacked jurisdiction to entertain a section 301 suit between non-contracting parties. *See, e.g., Aacon Contracting Co. v. Association of Catholic Trade Unionists*, 178 F. Supp. 129, 129-30 (E.D.N.Y. 1959), *aff'd*, 276 F.2d 958 (2d Cir. 1960).

The short answer to this argument is that it grossly mischaracterizes the factual findings of the district court. The court did *not* hold that General Marine illegally refused to execute the contract. Rather the court explicitly held that there *was* a valid contract between the parties and that General Marine attempted to repudiate the contract:

> [T]he April 13 repudiation was an ineffective termination of the agreement for collective bargaining purposes and General Marine, as of that point, remained bound by the agreement. . . . The April 13 Frank letter after the contract had been agreed upon, was untimely and also ineffective under federal labor law and policies.

The court therefore did not order the execution of a labor contract, a remedy that concededly lies exclusively within enforcement power of the National Labor Relations Board. *E.g., Wm. Chalson & Co. v. Amalgamated Jewelry Workers Local No. 1*, 478 F. Supp. 1103, 1108 (S.D.N.Y. 1979).

The court concluded that the facts made out a classic section 301 case of breach of a labor contract, and correctly based its jurisdiction on that statute. The fact that the court relied on federal labor law principles derived from NLRB adjudications in order so to catego-

rize the dispute and subsequently in order to rule on the substantive issues raised does not deprive the court of jurisdiction under section 301. *See Smith v. Evening News Association*, 371 U.S. 195 (1962). *Evening News* makes clear that courts in section 301 suits are entitled to consider facts that may also make out an unfair labor practice within the competence of the NLRB. *See Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 301 (1971). Insofar as General Marine's jurisdictional argument constitutes an indirect attack on the district court's factfinding and characterization of this action, for reasons we will fully discuss later we find the court's factfinding amply supported by the evidence on the record.

*Res judicata.* General Marine asserts that this court's prior holding in *General Marine Transport*, 619 F.2d 180, presents a res judicata bar to the current litigation. In that case it was determined that Local 333's unfair labor practice charge brought by the Board against General Marine, asserting that General Marine was not entitled to repudiate the Agreement, was time barred. The district court agreed that the two actions involved the same core of operative facts (General Marine's participation in, and attempted repudiation of, the Agreement), and that a ruling in Local 333's favor in the first action would have resulted in the trustees' recovering at least some of the damages they seek in the present action. The district court nonetheless ruled that res judicata did not apply because both the parties and some of the issues were different in the two suits, and the contract issue, though litigated, was not necessarily determined in the earlier action.

We agree fully with the district court's resolution of the res judicata argument. The trustees, plaintiffs in this suit, were not a party to the earlier action, nor could they be considered privies to Local 333 as a matter of law by virtue of the divergent responsibilities of pension or insurance fund trustees and union officials and lack of any showing of an agency relation. *Cf. NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (employer-selected trustees of trust fund are not "representatives" of the employer for purposes of the National Labor Relations Act); *NLRB v. Truck Drivers Local Union No. 449*, 728 F.2d 80 (2d Cir. 1984). To the extent that *National Benefit Fund for Hospital and Health Care Employees v. Presbyterian Hospital*, 448 F. Supp. 136 (S.D.N.Y. 1978), suggests a contrary result, we decline to follow it.

Moreover, there was simply never a prior holding on the scope of the Agreement and the effect of General Marine's attempted revocation which could bar future litigation on this question. All that was fully litigated in *General Marine* was the question how the six month statute of limitations applicable for unfair labor practice actions was to be tolled in the context of Local 333's unfair labor practice charge brought to the NLRB. The underlying contract question reached by the Board was not reached on the appeal in *General Marine*. This is a section 301 action, which, as we discuss *infra*, is governed by a different statute of limitations period, so the prior statute of limitations determination in *General Marine* does not act as a res judicata bar to the present action.

*Limitations period.* General Marine asserts that under the rule established in *DelCostello v. Teamsters*, 103 S. Ct. 2281 (1983), the six month limitation period of 29 U.S.C. § 160(b) should be applied to this section 301 suit.

If that limitations period did apply, the suit would concededly be time barred under the facts as found in *General Marine*, 619 F.2d 180.

*DelCostello* held that the six month limitations period of the NLRA should apply to hybrid section 301/fair representation cases since they closely resemble employee unfair labor practice actions which are governed by that limitations period. However, this suit much more closely resembles the traditional section 301 breach of contract action that has in the past been governed by analogous state contract law limitations, in this case New York's six year limitations period. N.Y. Civ. Prac. Law § 213.2 (McKinney 1972). *See Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966). *DelCostello* itself quoted with approval the holding in *Hoosier Cardinal*,[3] and we agree with the district court that the *DelCostello* holding turns on the particular nature of the duty of fair representation action, and cannot reasonably be expanded to all section 301 claims that involve facts which might also have established an unfair labor practice charge.

*Exhaustion of administrative remedies.* Appellant claims that the suit should be barred because the trustees failed to make use of the arbitration procedures available to them in the agreement. The existence of a duty of

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3 The following language from *Hoosier Cardinal* was quoted with approval in *DelCostello*:

> The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, . . . . 383 U.S., at 705 n.7.

103 S. Ct. at 2289-90 (citations omitted).

trustees to arbitrate claims for unpaid contributions before pursuing judicial remedies is to be determined by analyzing the collective bargaining agreement and trust agreement to see whether they call for such arbitration. *Schneider Moving & Storage Co. v. Robbins*, 52 U.S.L.W. 4476 (U.S. Apr. 18, 1984). Here the court undertook such analysis and determined that the Agreement's general arbitration provision did not apply to the trustees, since it explicitly referred only to claims by the employer, the union, or the Association. Since one specific arbitration provision did allow trustees to arbitrate when the *amount* of a delinquency was in issue, the court reasoned *expressio unius* that the exclusion of the trustees from all other parts of the arbitration section was intentional. The court's construction of the agreement is sound, especially in light of *Schneider Moving Co.*, decided after the district court's decision here. It is not even argued that the trust agreements themselves make the question(s) arbitrable.

*The merits.* The district court found that General Marine was a party to the Agreement signed by the Association on its behalf. It based this conclusion on the fact that Mrs. Berman gave written authorization to the Association to negotiate on behalf of General Marine as well as on the fact that Mrs. Berman later reaffirmed her intention to remain in the Association and be bound by the Agreement in spite of the inclusion of the two clauses to which General Marine objected. General Marine's name was listed as one of the employers on behalf of which the Agreement was signed, and the Agreement became effective at the expiration of the prior agreement, binding General Marine after it was signed, *see supra* note 2, on March 26, 1976.

General Marine argues that it never executed the Agreement since it repudiated it by letter on April 13 and stopped making Fund payments on the supposed effective date of the Agreement, April 1. However, the district court correctly, if implicitly, found that it was not up to General Marine to "execute" the agreement, at least in the sense of agreeing to be bound by it after it was signed. It had previously agreed to have the Association act as its agent, and when the Association's representative signed the Agreement, at that point General Marine, and all the other represented employers, were bound by it. To suggest otherwise is to ignore the past practice and clear understanding of the employers who made up the Association, as well as any coherent principles of agency law generally[4] or particularly in the context of the federal labor law. As we have indicated, *supra* note 2, individual employers did not sign onto the Agreement, nor was there any formal or informal device or procedure whereby they had a right to accept or reject it after it was signed by the Association on their behalf.

The court next found as a matter of federal labor law that Evelyn Frank's April 13 letter of repudiation was an ineffective termination of the Agreement and that, therefore, General Marine remained bound by that agreement. The court reached this conclusion by applying the labor law principle that an employer may not, barring "unusual circumstances," withdraw from a multiemployer bargaining unit without mutual consent once the negotiations have commenced. *E.g.*, *Charles D. Bonanno Linen Ser-*

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4 Under general common law agency principles, a principal is not entitled to repudiate its agent's authority after a contract entered into by the agent on behalf of the principal is executed and has become effective. *See Restatement (Second) of Agency* §§ 124A, 125 (1958).

*vice, Inc. v. NLRB*, 454 U.S. 404, 410-11 (1982); *NLRB v. Paskesz*, 405 F.2d 1201 (2d Cir. 1969).

Federal courts are at times obligated to apply labor law principles in adjudicating claims under independent statutory grounds of jurisdiction. *See, e.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85 (1982); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In this case the district court applied those principles correctly; indeed, it reached the same conclusion on the same reasoning as the Board did in the order that was vacated by this court on statute of limitation grounds. *General Marine Transport*, 619 F.2d 180.

General Marine argues that in any event it was entitled to repudiate the agreement (or, as it would have it, entitled to refuse to execute the agreement), because the "unusual circumstances" exception should have been applied in this case, since the Association had entered into an agreement that covered unrepresented employees, *see NLRB v. Local 210, International Brotherhood of Teamsters*, 330 F.2d 46 (2d Cir. 1964), and had thus exceeded its authority to negotiate on behalf of General Marine. General Marine points to the disputed "vegetable oil" and "subsidiaries and affiliates" clauses as evidence that the Association had exceeded its authority and purported to bind unrepresented employees.

While it is true that there are "unusual circumstances" which could justify a repudiation in this context, *see, e.g., NLRB v. Siebler Heating & Air Conditioning, Inc.*, 563 F.2d 366 (8th Cir. 1977), *cert. denied*, 437 U.S. 911 (1978), General Marine's argument fails here on a number of grounds. Even assuming, arguendo, that the two disputed clauses are illegal,[5] none of the employees for

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5 This court has held that the two clauses do not violate the antitrust laws. *Berman Enterprises*, 644 F.2d 930. However, the Regional Direc-

whom the employer withheld Fund contributions is in any way involved in the dispute about the two clauses,[6] so that even if the clauses are invalid this would not justify the nonpayments at issue here under the "unusual circumstances" exception, nor make the entire contract unenforceable and void. *Cf. Lewis v. Seanor Coal Co.*, 382 F.2d 437, 440-41 (3d Cir. 1967) (a "hot cargo" provision would not make entire agreement void and unenforceable), *cert. denied*, 390 U.S. 947 (1968). Neither an invalid contract provision nor a union unfair labor practice constitutes a defense to a trustees' suit for unpaid contributions unless the illegality lies in the trust provision sued on. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-86 (1982); *cf. Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) (union breach does not give rise to defense against duty to contribute to welfare fund).

Nor is this a case like, *e.g.*, *ILGWU v. NLRB*, 366 U.S. 731 (1961), where an entire contract was found unenforceable because the union did not have majority support of the people on whose behalf it purportedly was bargaining. *See also Mohawk Business Machines Corp.*, 116 NLRB 248 (1956). Such a mistake obviously would

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tor of the Board refused to issue a complaint brought by Local 333 against General Marine concerning General Marine's abrogation of the 1976-79 Agreement before the representation question concerning the General Marine employees on Berman vessels had been settled. She did so because she found that the "subsidiaries and affiliates" clause was an attempt to include employees not in the bargaining unit, and because she found that the vegetable oil clause was a "hot cargo" clause in violation of section 8(e) of the NLRA, 29 U.S.C. § 158(e) (1982).

6 The vegetable oil clause affects only Berman since only Berman tows vegetable oil barges. The "subsidiaries and affiliates" clause does not purport to bind any of the General Marine employees for whom pension and insurance payments are being sought, since these employees are all General Marine employees working on General Marine vessels and were Local 333 members.

infect the entire contract. Here, whatever problems there are with the "subsidiary and affiliates" clause do not affect the obligations General Marine has toward its employees clearly represented by Local 333 whose pensions are at issue here. Nor does the fact that Local 333 may have violated a no-strike clause, thereby, in General Marine's view, ending its obligations to the union, relieve General Marine of its obligations to the trustees in the absence of agreement to this effect. *Lewis v. Benedict Coal Corp., supra.* In sum, we agree with the district court that General Marine's termination was ineffective, and it therefore remained obliged to make Fund payments during the 1976-79 period.

*The damage award.* General Marine makes numerous objections to the $314,000 awarded the trustees as damages in this action. First it argues that since it provided alternate insurance coverage for its employees during the time in question, and because the trust therefore did not have to pay for insurance for the covered General Marine employees during that time, it should not be held liable to the Insurance Fund for unpaid contributions. However, the Agreement did not give General Marine the right to choose to whom it would make insurance payments. It was obliged to pay into the Funds established by the Agreement. The multiemployer Fund, which purchases a form of group insurance, is contractually required to keep the group intact, and the fact that appellant's improper conduct now requires it in essence to pay twice is simply irrelevant as regards its obligation to the Fund. *See Brogan v. Swanson Painting Co.*, 682 F.2d 807, 809 (9th Cir. 1982)(employer's obligation to make contributions to trust fund on behalf of employees for whose benefits employer paid cash); *Local 9, International*

*Union of Operating Engineers v. Siegrist Construction Co.*, 458 F.2d 1313, 1316 (10th Cir. 1972).

General Marine next objects to the fact that the court awarded the trustees prejudgment interest at the rate set out in the Agreement—2% above the prevailing rate charged by Citicorp Bank. It argues that such a rate constitutes punitive liquidated damages and it should therefore not be enforced as against public policy.

However, section 502(g) of ERISA, 29 U.S.C. § 1132(g)(2), explicitly states that "interest on unpaid contributions shall be determined by using the rate provided under the plan" or if none is specified a statutorily prescribed rate based on an adjusted prime rate figure. 26 U.S.C. § 6621 (1982). The statute itself allows plans to include a 20% liquidated damages provision, 29 U.S.C. § 1132(g)(2)(C)(ii), so it could hardly be considered against public policy for the parties to agree to a rate of 2% above the prime rate.

General Marine also objects to the court's awarding the trustees double interest and attorney's fees pursuant to 29 U.S.C. §§ 1132(g), 1145, which mandate these damages for suits to enforce the terms of plans. Those sections were added to the statute in a 1980 amendment to ERISA. This suit was instituted before 1980, and General Marine argues that the statute should not be applied to it retroactively.

The district court applied the general rule that a court applies the law in effect at the time it renders its decision unless doing so would result in a manifest injustice or would be contrary to legislative intent. *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). Finding no injustice or contrary legislative intent, it applied the 1980 amendments, relying on other decisions that have also applied them in this context. *See Central States,*

*Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, 522 F. Supp. 919 (E.D. Mich. 1981). *See also San Pedro Fisherman's Welfare Trust Fund Local 33 v. Di Bernardo*, 664 F.2d 1344, 1346 (9th Cir. 1982); *cf. Bugher v. Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983) (applying the 1974 ERISA attorneys' fees provision to a suit initiated pre-ERISA), *cert. denied*, 52 U.S.L.W. 3844 (U.S. May 21, 1984). *But see Hammond v. James W. Griffin Co.*, 520 F. Supp. 162 (N.D. Ga. 1981).

General Marine's argument is that section 1132(g)(2) is not merely an additional remedy imposed on already proscribed conduct, but rather that it is a provision which creates a new violation of federal law, since it specifically penalizes violations of 29 U.S.C. § 1145, a section that was also added in 1980. It would therefore be unjust, it argues, to impose a penalty for conduct that would not have subjected it to federal liability when it was committed.

Whatever the strength of this argument as a matter of law, *cf. generally Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 52 U.S.L.W. 4810 (U.S. June 18, 1984) (not unconstitutional for Congress to impose withdrawal liability retroactivity), it misstates the facts. A default in fund contributions *would* have subjected General Marine to federal liability before the 1980 amendments, albeit under a different statutory provision. *See* 29 U.S.C.A. § 1132 (1975) (pre- amendment); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). The 1980 amendments in this regard did not penalize conduct which was previously not subject to federal liability, they merely changed the remedial scheme somewhat by *requiring* the award of interest and attorney's fees where previously those remedies were assessed at the discretion of the trial judge. *See Alco*, 522

F. Supp. at 922-23. The amendments also provided for a double interest payment or alternative liquidated damages to compensate the fund for costs incurred in connection with delinquencies. *Id.* at 928.

Moreover, the fact that the complaint was not formally amended to allege a violation of new section 1145 does not make application of the new statutory penalty inappropriate or unfair, as General Marine asserts. The applicability of the double interest provision was fully briefed and argued below, so appellant can hardly argue that it was not on notice of the claim. Moreover, the court was entitled to enter whatever relief it felt appropriate at the trial, whether or not it was requested in the pleadings. Rule 54(c), Fed. R. Civ. P.; *Newberger, Loeb & Co. v. Gross*, 611 F.2d 423, 432-33 (2d Cir. 1979) (awarding prejudgment interest).

Finally, General Marine objects to the court's decision to award attorney's fees to the trustees pursuant to section 1132(g) for costs incurred defending the counterclaim, arguing that it is not properly part of the "action" to enforce plan payment for which fees are authorized under section 1132(g)(2). However, the counterclaim was between the same parties, grew out of the same general contractual dispute, and, if successful, would have stopped the trustees from collecting any damages in the original suit, as it sought recovery of a sum greater than that sought by the plaintiffs. In those circumstances, the court was entitled to award attorney's fees to the trustees to defend the counterclaim, and indeed appellant points to no case law or statute which suggests otherwise. It was part of the same action.

*The counterclaim.* General Marine's counterclaim seeks repayment from the trustees for around $200,000 of health insurance and pension contributions made to them

during 1973-76 for the General Marine employees who worked on Berman vessels. General Marine asserts that these employees were never properly part of Local 333 or therefore attorned to the 1973-76 agreement, and that the payments made for those employees pursuant to that agreement should never have been made and did not benefit those employees. It requests that the money be returned and placed with an independent receiver.

General Marine rests its argument on two grounds relating to alleged violations of LMRA section 302(c)(5), 29 U.S.C. § 186(c)(5) (1982).[7] First, it asserts that, pursuant to section 302(c)(5)(B) as interpreted by *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969), the contributions should never have initially been made to the Funds. Second, it claims that the contributions now will not be used "for the sole and exclusive benefit of the [covered] employees" as required by section 302(c)(5), and so should be returned to a receiver to be used for the benefit of the employees.

Initially, as the district court noted, there is a substantial standing barrier to General Marine's making these claims at all, in particular in making its second claim. General Marine has no personal stake in the outcome of this controversy, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). If it were to prevail, a receiver would have to be appointed to hold the money for the benefit of either the affected employees or the MEBA trust. General Marine neither alleges that it was injured in any way by

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7 (c) Exceptions

The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, . . . *Provided*, That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . .

its purportedly improper payments, nor that it will gain in any way if it succeeds in the counterclaim. Nor is it in a position as an employer to sue on behalf of its former employees. *See Fire Equipment Manufacturers' Association, Inc. v. Marshall*, 679 F.2d 679, 681, 683 (7th Cir. 1982) (OSHA standards), *cert. denied*, 103 S. Ct. 728 (1983). None of the cases General Marine relies upon were brought alone by an employer—in each case either a trust fund, a union, or groups of employees have participated when a trust fund is sued on the ground that some other fund or group of employees is entitled to money that has been deposited in the fund.

But even if as settlor of the trust General Marine has standing, the district court correctly concluded that General Marine was not entitled to recover on the counterclaim. Under section 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B), an employee benefit fund may not accept contributions from an employer unless the employer is party to a written document specifying the basis for the contribution. *Moglia*, 403 F.2d 110. General Marine argues that the employees in question were found not to have been covered by the 1973-76 agreement, so that there was no written agreement authorizing the payments, and the money should therefore be returned to it.

The argument is that the Board made a determination that there was no contract bar to holding a representational election for all employees who worked on Berman barges, including those at issue here who were on General Marine's payroll at the time. Thus it is argued that there was no valid written agreement with Local 333 covering these General Marine employees working on Berman barges which would allow General Marine to contribute to the Funds for these employees.

However, the Board's determination that there was no contract bar to holding a representational election is not equivalent to a holding that for all purposes there is no valid written agreement between the employees and another bargaining representative. *See The Kroger Co.*, 165 NLRB 872 (1967); *General Extrusion Co.*, 121 NLRB 1165 (1958). The "contract bar" doctrine is a prudential concept used by the Board for representational election purposes only. Here there clearly *was* a written agreement covering all of General Marine's employees, including the employees in question here, at least as regards Fund payments. As the district court noted, each month General Marine submitted contributions to the trustees along with written and signed records stating that given amounts of contributions were being made for all their employees, including those who were working on Berman vessels. The Fund paid all benefit claims for these employees, and the Pension Fund has given full eligibility and pension credit for the entire period. The situation deemed not to give rise to a contract bar here is nothing like that in *Moglia*, where an employee's widow unsuccessfully sought to recover pension payments. There the trustees refused to pay the funds to the alleged beneficiary, successfully contending that the employee's employer had never entered into a collective bargaining agreement or a pension trust with the union. Here the trustees have paid out all the claims for the employees in question, and there is no question that General Marine had a valid contract with Local 333 and that the employees in question were on General Marine's payroll.

General Marine's second and more substantial argument is that the retention by the Funds of contributions made on behalf of these employees violates that part of section 302(c)(5) which requires that an employer's contri-

butions must be "for the sole and exclusive benefit of the employees of such employer . . . ." General Marine contends that section 302(c)(5) requires that a voluntarily departing group of employees be permitted to take a portion of the pension fund with them, either through direct repayment of contributions or through segregation of assets to be administered by a court-appointed administrator. *See Local 50 Health Benefits Fund v. Local 3 Welfare Fund*, No. 83-7648, slip op. at 3123 (2d Cir. Apr. 19, 1984); *Alvares v. Erickson*, 514 F.2d 156 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975).

However, this is not a case like *Local 50* or *Alvares* where an entire group of employers and their employees (*Alvares*), or all of an employer's employees (*Local 50*) have left a fund en masse creating a great distortion in the organization and financing of the Funds.[8] In those cases the "failure to transfer the portion of its reserves attributable to [the departing employer's contribution means that] . . . *none* of [the employer's] employees will benefit at all from [the employer's] contributions." *Local 50*, slip op. at 3138 (emphasis in original). It was precisely on that ground that *Local 50* was distinguished from *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), where it was held that section 302(c)(5) did not otherwise impose a reasonableness requirement on welfare plan provisions. *Id.* at 570-76.

Here some employees once on General Marine's payroll voluntarily chose to join a different union and therefore a

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8 Most problems created by employer withdrawal from multi-employer pension plans have subsequently been resolved by statute in the Multiemployer Pension Plan Amendments Act of 1980, which, however, did not apply to changes in bargaining representation occurring before April 29, 1980. See 29 U.S.C. §§ 1415, 1461(e)(2)(a) (1982).

different welfare and pension plan. Other employees remained on General Marine's payroll and remained members of Local 333 and fund participants. To claim that monies retained by the Funds contributed by an employer on behalf of all its employees is not contributed "for the sole and exclusive benefit of the employees of such employer" whenever some of the employees choose to leave the union and fund would be an unfair and unrealistic construction of section 302(c)(5). This is especially true when considering pension funds, where financing is based on long-range actuarial projections and vesting requirements which assume that some employees for whom contributions are made will never be eligible for benefits. *See, e.g., Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1267-68 (9th Cir. 1979); 29 U.S.C. § 1053 (1982).[9] Here the employees in question received pension credit for the entire period in question. Some of these employees already have vested pension rights and others may achieve vesting under the terms of the plan while members of the MEBA. Simply put, section 302(c)(5) does not require that when a small number of employees leave a large multiemployer unit, pension funds, by virtue of that circumstance alone, must return money contributed on their behalf to the employees or their new funds.

Judgment affirmed.

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9 It is worth noting in this regard that neither *Local 50* nor *Alvares* involved pension funds, both being suits to recover welfare fund reserves.

**Opinion of the District Court dated December 4, 1981**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

December 4, 1981

No. 78 Civ. 6277 (RWS)

JOSEPH O'HARE, Albert M. Cornette, Peter Gale, Bruce A. McAllister, Robert W. Sanders and Thomas E. Moran, as Trustees of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund,

*Plaintiffs*,

v.

GENERAL MARINE TRANSPORT CORPORATION,

*Defendant*.

BERMAN ENTERPRISES, INC., Standard Tank Cleaning Corp., and General Marine Transport Corp.,

*Plaintiffs*,

v.

LOCAL 333, UNITED MARINE DIVISION, ILA, et al.,

*Defendants*.

OPINION

SWEET, *District Judge*.

Plaintiff trustees of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund

("the Trustees" or "the Funds") are seeking a partial summary judgment against defendant General Marine Transport Corporation ("General Marine") on the issue of liability for contributions allegedly due the Funds pursuant to a collective bargaining agreement between Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO ("Local 333"), and the Marine Towing and Transportation Employers' Association ("the Association"), an association representing companies in the multi-employer bargaining unit of which General Marine is alleged to be a member. General Marine has also moved for summary judgment and seeks dismissal of the complaint. For the reasons stated below, which constitute the findings of fact and conclusions of law, the motion of the Trustees will be granted, and the motion of General Marine will be denied.

Certain issues involving these, or related parties, have been the subject of extensive litigation before the Second Circuit, the NLRB, and this court. Familiarity with *General Marine Transport Corp. v. NLRB*, 619 F.2d 180 (2d Cir. 1980) *Berman Enterprises, Inc. v. Local 333, United Marine Division, International Longshoreman's Assoc.*, 644 F.2d 930 (2d Cir. 1981) and their underlying facts is assumed. The undisputed facts set forth by both the Trustees and General Marine with respect to the instant motion are briefly set forth below.

General Marine is a wholly owned subsidiary of a holding company owned by various members of the Berman family. It operates sludge vessels used for dumping sewage sludge out at sea. From 1973 through 1976 General Marine, as a member of the Association, was a party to a collective bargaining agreement with Local 333. Shortly before the agreement expired, General Marine completed an authorization form authorizing the Association to negotiate on its behalf. During the negotiations the question of resignation by General Marine from the Association arose, as well as a proposed contract provision binding General Marine and its "affiliates." General Marine was given the opportunity to resign from the Association, but refused to do so. On March 26, 1976, the Association and Local 333 executed a new three-year collective bargaining

agreement ("the contract"). Although substantially renewing the basic provisions of the prior agreement, it purported to cover all employers as well as a "subsidiary company, an affiliated company or a company division in the Port of New York and vicinity."

On April 13, 1976 Peter Frank, Vice President of General Marine ("Frank") wrote to Local 333 stating the refusal of General Marine to be bound by the contract, claiming that its scope exceeded the Association's authority. Between April and August, 1976, Local 333 filed several unfair labor practice charges with the Board against General Marine and Berman. The first complaint was denied by the Board. In the second complaint, Berman and the Board agreed in a settlement that Berman would not recognize the Marine Engineers' Beneficial Association ("MEBA") until representation proceedings were completed. The third charge was withdrawn by Local 333 in light of the representation proceedings. On December 10, 1976 in the representation proceedings the Regional Director determined that General Marine was bound by the contract and therefore barred from having election proceedings and that Berman and its other affiliates should have elections to determine the proper bargaining agent. Local 333 alone requested review of this decision which was denied by the Board. After an election MEBA was certified as the bargaining agent for ships owned by Berman and its affiliates other than the two ships operated by General Marine, the Susan Frank and the Rebecca K.

Between January and March, 1977, with the representation question settled, Local 333 demanded that General Marine honor the terms of the contract. On February 28, 1977, Local 333 filed an unfair labor practice charge with the Board. The Administration Law Judge ("ALJ"), relying on the report from the representation proceedings pursuant to § 102.67(f) of the Board's Rules and Regulations, found that General Marine was bound by the contract and had committed an unfair labor practice. The Board affirmed the decision on October 24, 1978. The Second Circuit set aside the Board's decision hold-

ing that the unfair labor practice was time-barred by the six-month filing provision of § 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b). *General Marine Transport Corp. v. NLRB*, 619 F.2d 180 (2d Cir. 1980).

After the April 13, 1976 notice of termination by General Marine, referred to above, the members of Local 333 struck the two General Marine barges for two days on April 28, 1976. General Marine contends that the strike was a response to implementation of the wage rates under the new contract. The Trustees asserted that the strike was due to unauthorized manning changes on the vessels. Frank, by letter dated April 30, 1981, claimed that, because of the strike, General Marine would no longer be bound by the contract pursuant to Article I, Section 8 of the contract which provides in part that "[u]pon the violation of this [no strike] Section by the Union or any of the Employees, this Agreement may be terminated with respect to and by all and any of the Employers." The strike ended that day after discussions between Frank and union representatives. The Trustees contend that the termination was rescinded, and General Marine contends that the termination remained in effect with Local 333 agreeing to work under the emergency health situation then existing. There is a factual issue therefore as to the basis of the strike and its resolution.

This action by the Trustees seeking recovery of pension fund contributions under the contract initially was brought as a counterclaim in the anti-trust case brought by Berman against Local 333 and the Association, referred to earlier. After the Trustees were dropped as defendants in that action, the counterclaim was severed from the anti-trust suit and asserted through an independent complaint. It is the only contract violation presently being asserted against General Marine that is before the court.

Jurisdiction for this action is properly predicated on § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, and the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq; see Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960); *American Ben. Plan Admin., Inc. v. D &*

*E Corp.*, 90 CCH Labor Cases ¶ 12,428 (C.D.Cal.1980); *Hann v. Harlow*, 271 F.Supp. 674 (D.Or.1967).

Although the facts that give rise to a § 301 claim may well have been actionable as an unfair labor practice within the proper jurisdiction of the National Labor Relations Board ("NLRB"), § 8 of the National Labor Relations Act ("NLRA") 28 U.S.C. § 158, the board's jurisdiction is not exclusive:

> The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and it does not destroy the jurisdiction of the court under § 301.

*Smith v. Evening News Ass'n*, 371 U.S. 195, 197, 83 S.Ct. 267, 268, 9 L.Ed.2d 246 (1962); *see also Amalgamated Ass'n of Street, Electric Railway, & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 277-301, 91 S.Ct. 1909, 1913-1925, 29 L.Ed.2d 473 (1971); *Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc.*, 639 F.2d 487, 490 (9th Cir. 1980). Therefore this court properly has jurisdiction over this action.[1]

In *General Marine Transport Corp. v. NLRB*, 619 F.2d 180, the Second Circuit determined that Local 333's unfair labor practice charge brought by the board against General Marine was time-barred by the six-month filing provision of § 10(b) of the NLRA, 29 U.S.C. § 160(b). Thus the court granted General Marine's petition to set aside an NLRB order in favor of Local 333. This decision does not present a res judicata bar

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1 *Wm. Chalson & Co. v. Amalgamated Jewelry, Diamond & Watchcase Workers Union*, 478 F.Supp. 1103, 1108 (S.D.N.Y. 1979), does not suggest that the court lacks jurisdiction. There the court refused to compel an employer to arbitrate under a collective bargaining agreement reached after his withdrawal from the industry bargaining association despite the claim of an unfair labor practice resulting from such withdrawal. Despite its unwillingness to enforce the contract, the association's agency having been terminated, the court deferred to a pending NLRB unfair labor practice proceeding to determine the validity of the contract and the effect of the withdrawal. The court did not hold that it lacked jurisdiction to consider the validity of the contract.

to this case nor collaterally estop the determination of the issues relevant to this case since the causes of action differ and the issues relevant to the instant action were not necessarily previously determined.

The judicially developed doctrine of res judicata evolved primarily to avoid repetitious litigation of the same causes of action. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1933). Through its operation parties to an action or their privies are barred from relitigating a cause of action where a judgment on the merits has already been rendered, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 601, 71 L.Ed. 1069 (1927), and there is an identity of parties and issues between the two actions. *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1232-33 (2d Cir., *cert. denied*, 434 U.S. 903, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977). The doctrine of collateral estoppel renders a prior judgment conclusive as to matters necessarily determined and litigated in the prior action. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. at 597-98, 68 S.Ct. at 719; *Expert Electric, Inc. v. Levine*, 554 F.2d at 1233.

A "cause of action" for res judicata purposes "is not a matter of precision nor subject to the application of any mechanical formula." *Id.* at 1234. The facts surrounding the transaction or occurrence, rather than the legal theory upon which a litigant relies, is generally stated to constitute the cause of action and entails considering whether the rights determined in the prior action would be impaired by the subsequent action. *Id.; Moreno v. Marbil Productions, Inc.*, 296 F.2d 543, 545 (2d Cir. 1961).

Here although the legal theory for this action differs from the NLRB cause, both arose from the same core of operative facts and the prior action charging an unfair labor practice sought compliance with the contract which would have resulted in the payment of the amount claimed to be due in the current action. Since a ruling based on a statute of limitation is generally deemed a decision on the merits, *Mathis v. Laird*, 457 F.2d 926, 927 (5th Cir.), *cert. denied*, 409 U.S. 871, 93 S.Ct.

201, 34 L.Ed.2d 122 (1972), *National Ben. Fund for Hospital & Health Care Employees v. Presbyterian Hospital in New York, Inc.*, 448 F.Supp. 136, 138 (S.D.N.Y.1978), the instant action may initially appear to be barred by the Court of Appeals decision in 1980.

Under the circumstances of this type of action, however, res judicata should not apply both as a matter of equity and law. As noted above, the NLRB and the district court have concurrent jurisdiction over two actions arising from the same set of facts and circumstances when the two claims asserted are for an unfair labor practice and for breach of a collective bargaining agreement. *Smith v. Evening News Ass'n*, 371 U.S. at 197, 83 S.Ct. at 268. Since jurisdiction for a § 301 claim for the funds to be paid under the contract is vested in the district court and not in the NLRB, a § 301 action could not have been brought in the prior proceeding before the NLRB. The present claim for relief sought, the payment of funds due under the agreement based on a breach of contract, though stemming from a common nucleus of facts, should not be barred by res judicata if it never could have been achieved in the prior proceeding. The issues are thus not identical and neither are the parties.

Thus the pertinent inquiry addresses the collateral estoppel effect that results from the Second Circuit's decision after the NLRB proceeding. The issues of the validity, repudiation and breach of the contract were not addressed in the prior action by the Circuit Court. The Second Circuit's decision considered the date of the repudiation and whether a continuing repudiation could be considered a continuing unfair labor practice starting the six-month NLRB limitation period anew. 619 F.2d at 186-87; *see Local Lodge 1424 International Assoc. of Machinists v. NLRB*, 362 U.S. 411, 422, 80 S.Ct. 822, 829, 4 L.Ed.2d 832 (1960). The repudiation occurred on April 13, 1976, no subsequent actions were found to estop General Marine from asserting the statute of limitations defense, and the continuing violation theory was rejected. *General Marine Transport Corp. v. NLRB*, 619 F.2d at 188. The validity of the

contract and the effect of repudiation were not considered. Although these issues were litigated, their resolution was not necessary to the determination of the prior action by the Second Circuit, hence no collateral estoppel. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. at 597-98, 68 S.Ct. at 719.

Furthermore, the rights established in the Second Circuit's decision will not be impaired by this holding. Since the unfair labor practice charge was dismissed on statute of limitations grounds, resort to the administrative procedures of the NLRB, and a hearing before an administrative law judge to redress an unfair labor practice was precluded by the delay in filing. Section 10(b) addresses the administrative remedies provided by Congress to resolve unfair labor practices, *cf. United Parcel Services, Inc. v. Mitchell*, 451 U.S. 56, 68 n.4, 101 S.Ct. 1559, 1567 n.4, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring), while the definition of unfair labor practices is contained in another section. These administrative remedies do not address the availability of money damages as relief before a district court based on a breach of contract. Moreover, the NLRB's jurisdiction over unfair labor practices does not preclude a district court from exercising jurisdiction over an action "even where such award presents a potential conflict with an NLRB decision." *Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc.*, 639 F.2d at 490. The district court properly retains jurisdiction to the extent the § 301 action is governed by the collective bargaining agreement. *Motor Coach Employees v. Lockridge*, 403 U.S. at 300-01, 91 S.Ct. at 1924-25; *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1234-35 (9th Cir. 1979).

In addition the initiation of the unfair labor practice claim by the union before the NLRB did not constitute a waiver of § 301 claims by the trustee in the district court. Before the NLRB Local 333 sought to redress an unfair labor practice claiming that General Marine breached the contract. In the instant action the trustees seek to recover for payments allegedly due based on the contract. Both claims have indepen-

dent and concurrent sources of jurisdiction and could not have been asserted in the same forum. The assertion of one by the union does not bar assertion of the other by the trustees. *National Benefit Fund for Hospital & Health Care Employees v. Presbyterian Hospital*, 448 F.Supp. 136, is not to the contrary. In *National Benefit*, the plaintiff Fund, although not required to, agreed to submit a dispute to arbitration where it was determined that the claim was barred by laches. The Fund then sought to assert a claim again based on the collective bargaining agreement in district court under ERISA. The court held that res judicata from the arbitration award barred the district court action. In that case the parties voluntarily submitted the dispute to arbitration for resolution, and then the losing party sought to assert the same basis for recovery in the district court as had been asserted in the arbitration proceeding. In the instant case, although both actions ultimately could turn on the validity of the collective bargaining agreement, independent and concurrent sources of jurisdiction are asserted as the basis for recovery.

Since the prior and the instant claims are separate causes of action, they invoke separate and distinct statutes of limitations. As discussed and applied by the Second Circuit, the statute of limitations applicable to an unfair labor practice charge before the NLRB is six months. 29 U.S.C. § 160(b). Under § 301 the applicable statute of limitations is generally that of the state in which the cause of action arose with due regard for the federal policies involved. *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705-07, 86 S.Ct. 1107, 1113-14, 16 L.Ed.2d 192 (1966); *cf. United Parcel Service, Inc. v. Mitchell*, 451 U.S. at 60 & n.2, 65-71, 101 S.Ct. at 1562 & n.2, 1565-1568 (Stewart J., concurring). The appropriate statute of limitations period for breach of contract actions in New York is six years and is applicable to the instant action. N.Y.Civ.Prac. Law and Rules § 213(2); *Abrams v. Carrier Corp*, 434 F.2d 1234, 1252-53 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971);

*see also Savoretti v. Hotel & Restaurant Employees & Bartenders International Union Pension Fund*, 470 F.Supp. 1286, 1289 (S.D.N.Y. 1979). Nor has the defendant submitted or this court found another New York statute of limitations that would be more appropriate. *United Parcel Service v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981). Thus this § 301 action is timely filed, properly before this court and not barred or decided by res judicata or collateral estoppel.

The final asserted jurisdictional defect, that this action should be dismissed because of a failure to pursue arbitration procedures, *see United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 4 L.Ed.2d, 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), is also without merit. The duty of a party to arbitrate before pursuing judicial proceedings is to be resolved by analysis of the collective bargaining agreement as it applies to the pension funds in accordance with applicable substantive federal law. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80,* 605 F.2d 1290, 1294 (2d Cir. 1979); *Moruzzi v. Dynamics Corp. of America*, 443 F.Supp. 332, 333 (S.D.N.Y.1977). Such analysis is properly before the court. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S.Ct. 909, 913, 11 L.Ed.2d 898 (1964). Although in construing an arbitration clause, the duty to arbitrate is generally favored, *United Steelworkers of America v. Warrior & Gulf Navigation*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-53, 4 L.Ed.2d 1409 (1960), none the less the duty must be enunciated in the contract. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974). In the instant case the Funds were only beneficiaries and not parties to the collective bargaining agreement and indeed are independent of Local 333. The general arbitration provision in Article II of the collective bargaining agreement does not explicitly or implicitly apply to the Trustees. It explicitly refers to claims

brought by an employer, the union or the association and provides for the proper procedures for initiating arbitration. Since the Funds are otherwise mentioned in regard to arbitration, their exclusion from the general provision combined with the specific mention of other parties indicates that the section is inapplicable to the Funds without reference to another section of the collective bargaining agreement. General Marine has not argued to the contrary.

Article I, Section 16(d) of the contract deals with employer delinquencies in insurance and pension payments.[2] This provision refers to the union's right to strike a delinquent employer without violating the "No Strike" clause of the contract. The section also specifically refers to the Trustees' right to recover legal fees incurred in enforcing payment under the contract. One exception to the right to strike occurs when the employer 'questions' the amount due, in which case a bond shall be posted and the dispute shall be resolved through arbitration. Resort to arbitration occurs when the amount due is questioned. In this case liability itself is contested, which is clearly beyond the scope of this narrow duty of the Trustees to arbitrate, particularly in light of the fact that the Trustees were

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2 Section 16(d) of the contract provides in pertinent part:

> Nothing contained herein, however, shall prevent the Union from immediately striking the said delinquent Employer until all monies owed hereunder by the delinquent Employer are paid . . . and if the Trustees incur legal expense in enforcing payment of such delinquent amount, the Trustees shall also be entitled to recover their reasonable counsel fees and other expense incurred in effecting collection. Such strike shall not violate the "no strike clause" and shall not be subject to the grievance and arbitration machinery of this contract.
>
> In the event that the amount of delinquency alleged to be due by the Funds' Administrator is questioned by the Employer, the Employer may post a surety company bond in a form satisfactory to the Administrator or in lieu thereof, a cash deposit, for the amount certified by the Administrator of the Funds, in which event the Union shall not strike the delinquent Employer before the date of termination set forth in the aforesaid notice and the amount in dispute shall be resolved in accordance with the grievance and arbitration machinery of this contract.

not signatories to the collective bargaining agreement. *See Lewis v. Benedict Coal Corp.*, 361 U.S. at 468-70, 80 S.Ct. at 494-95; *Todd v. Casemakers, Inc.*, 425 F.Supp. 1375, 1378 (N.D.III.1977); *Wishnick v. One Stop Food & Liquor Store, Inc.*, 359 F.Supp. 239, 242-43 (N.D.III.1973). Under the circumstances of this case and the terms of the collective bargaining agreement there was no duty to arbitrate on the part of the Trustees, and therefore no jurisdictional defect for their failure to do so.

Next General Marine contends that it is not bound by the agreement because it purported to bind all affiliates of General Marine, and therefore under traditional agency law the contract was beyond the scope of the Association's authority. *Scientific Holding Co. v. Plessey, Inc.*, 510 F.2d 15 (2d Cir. 1974). Although the contract did purport to bind General Marine's affiliates, these actions do not indicate that the Association exceeded its authority as to General Marine. The only parties that can contest their inclusion in the agreement on that basis are the affiliates of General Marine since the Association never had any authority to bargain on the affiliates behalf. Indeed, as a result of the representation proceedings elections were held and another union was established as the proper bargaining agent for workers aboard the affiliates' vessels. However, this in no way affected the ability of the Association to bargain on behalf of General Marine, a separate entity, as the Association properly did. Therefore, the April 13 repudiation was an ineffective termination of the agreement for collective bargaining purposes and General Marine, as of that point, remained bound by the agreement. In the instant action General Marine was well aware of the Association's intention to include the "affiliates' clause" in the agreement, and was given ample opportunity to withdraw from the Association prior to completion of the collective bargaining agreement but expressly refused to do so. The April 13 Frank letter after the contract had been agreed upon, was untimely and also ineffective under federal labor law and policies.

In construing collective bargaining agreements, it has been established that § 301 of the LMRA is more than a jurisdic-

tional statute, and "authorized federal courts to fashion a body of federal laws for the enforcement of these collective bargaining agreements." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451, 77 S.Ct. 912, 915, 1 L.Ed.2d 972; *Smith v. Evening News Ass'n*, 371 U.S. at 199, 83 S.Ct. at 269. The substantive law to be applied under § 301 is federal which must be fashioned from the policy of the national labor laws. *Textile Workers Union v. Lincoln Mills,* 353 U.S. at 456, 77 S.Ct. at 917.

Here, General Marine's claims conflict with the rule that absent an impass in negotiations or unusual circumstances, an employer may not unilaterally withdraw from a multiple employer bargaining agreement after negotiations have commenced for to do so would be an unfair labor practice. *NLRB v. Paskesz,* 405 F.2d 1201, 1202 (2d Cir. 1969); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005, 87 S.Ct. 711, 17 L.Ed.2d 544 (1967). *Paul v. Lindgren*, 375 F.Supp. 843, 851 (N.D.III.1974).

General Marine further contends that the contract was not in effect after the repudiation of the contract on April 30, 1976 pursuant to its terms as a consequence of the April 28, 1976 strike of Local 333 members and that it had not received the benefit of the contract.

The Trustees assert that General Marine breached the collective bargaining agreement by failing to make the payments required under the contract. General Marine does not deny failing to make the payments but instead contends that there are material issues of disputed fact which indicate that the contract may indeed be invalid and unenforceable. The Trustees claim that the strike was in response to unilateral manning changes on the sludge vessels made by General Marine, but that Frank and Union representatives agreed that the contract would remain in effect, that manning changes would be made only after consultation among the parties, and that the termination letter was to be deemed rescinded. General Marine claims that the strike resulted from the payment of wages specified as in the contract and denies an agreement to consult

before manning changes were made or to terminate the rescission and claims that the agreement was only to get the workers back on the job to remedy the emergency health situation. Despite these issues relating to the motivation for the strike and the reasons for its termination, there remain no issues of material fact necessary to the resolution here.

For the purposes of this motion it will be assumed that the April 30, 1976 termination was not rescinded. Notwithstanding, it was not effective. In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1959), the Supreme Court addressed the independent nature of labor union welfare funds, and the inability of an employer to assert a unions' breach of the collective bargaining agreement as a defense to payment due to funds. After indicating that a funds' rights under a collective bargaining agreement were not typical third party beneficiary rights, the court found as a matter of substantive federal labor law that the parties to the contract must unequivocally express an agreement that a union's breaches of the agreement will give rise to a defense to the employer's duty to contribute to the Trustees. This was based on the fact that the Trustees are independent of the union and serve beneficiaries who are not necessarily still members of the union and was thus held to promote national labor policies. Thus the union's wrongful action should not be held against the beneficiaries of the trust. Thus the court denied a defense or set-off to payments due under the contract based on the union's breach of the contract. Similarly in the instant action General Marine's right to terminate the agreement for an unauthorized strike does not specifically mention the trustees as subject to the right of termination. In this case, as there were Local 333 members continuing to work on General Marine's barges, the trustees' rights to funds for these employees should not be divested by a termination as a matter of federal law under § 301.

Denying the Trustees' claims would have the effect of condoning action thus prohibited by Section 8(d) of the NLRA, the termination of the contract without including adequate notice, offers to meet and confer with the opposition as well as

compliance with other provisions and be in direct conflict with national labor law and policy. Although the collective bargaining agreement may indicate that the employer has the authority to terminate the agreement if the conditions were as asserted by General Marine, the effect of such termination should be construed in light of the national labor policy and law with which General Marine was quite familiar. 29 U.S.C. § 158(d). As the First Circuit stated:

> If the continued validity of a collective bargaining agreement which is the subject of suit under § 301 depends on the effectiveness of a notice of termination, this must be determined by the federal court upon an application of the rules laid down in § 8(d) of the act . . .

*International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers, Local Union No. 25 v. W. L. Mead, Inc.*, 230 F.2d 576, 582 (1st Cir.), *cert. dismissed*, 352 U.S. 802, 77 S.Ct. 21, 1 L.Ed.2d 37 (1956). Concededly, none of these measures has been complied with and therefore the purported repudiation was ineffectively made under provisions of the national labor law as formulated in the NLRA whether or not the union's two-day strike also violated the appropriate termination procedures. *General Marine Transportation Corp. & United Marine Division, Local 333*, 228 NLRB No. 128 (1977). Therefore, given the independent status of the Trustees and General Marine's failure to abide by lawful termination procedures, the termination by the company as to the working Local 333 members was not effective.

Although some of the factors discussed in the preceding analysis entail consideration of unfair labor practices as they relate to defenses to enforcement of a collective bargaining agreement, such factors are not beyond the scope of this court's review and can be considered in determining federal law and whether a contract is valid and in effect because such provisions are clear statements of the national labor policy. In *Todd Shipyards Corp. v. Industrial Union of Marine & Shipbuilding Workers, Local 39*, 344 F.2d 107 (2d Cir. 1965), although it denied recovery, a district court was found to have

properly considered an action seeking a declaratory judgment that a clause of a collective bargaining agreement was unenforceable based on an unfair labor practice under § 8(e) of the NLRA, 29 U.S.C. § 158(e). *See also International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers, Local Union No. 25 v. W. L. Mead, Inc.*, 230 F.2d at 582; In *Paul v. Lindgren*, 375 F.Supp. at 851, an untimely withdrawal from a multiple employer agreement was analyzed under the role stated in *NLRB v. Paskesz*, 2 Cir., 405 F.2d 1201, and *NLRB v. Sheridan Creations*, 2 Cir., 357 F.2d 245. Also in an analogous situation the court held in *Perma-Line Corp. v. Sign Pictorial & Display Union, Local 230*, 639 F.2d 890, 894-95 (2d Cir. 1981), that a provision of collective bargaining agreement that violated unfair labor practice sections of federal labor laws, §§ 8(a)(3) and (b)(2) of the NLRA 29 U.S.C. §§ 158(a)(3) and (b)(2), is void and unenforceable and cannot be the basis for an arbitration award. Thus, these policies and considerations are properly before the court in determining the relevant federal law.

Based on the foregoing discussion, General Marine has raised no genuine issue of material fact challenging the validity of the collective bargaining agreement or sufficiently establishing a valid termination. Since the payments were due under the collective bargaining agreement but have not been made, and General Marine has raised no genuine issue as to a defense, General Marine has breached the agreement as to the Trustees. Consequently General Marine's motion for summary judgment is denied, and the Trustee's motion for partial summary judgment on the issue of liability for any payments proven to be due is granted. Final judgment will be entered upon a determination of the amount of the Trustees' claim following a hearing to be scheduled within ten (10) days in the event that the parties cannot reach agreement on the amounts involved.

IT IS SO ORDERED.

**Opinion of the District Court dated March 31, 1983**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

March 31, 1983

No. 78 Civ. 6277 (RWS)

JOSEPH O'HARE, Albert M. Cornette, Peter Gale, Bruce A. McAllister, Robert W. Sanders and Thomas E. Moran, as Trustees of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund,

*Plaintiffs*,

—v.—

GENERAL MARINE TRANSPORT CORPORATION,

*Defendant*.

OPINION

SWEET, District Judge.

Here is yet another chapter in the annals of the conflict between the Berman family and Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO ("Local 333"). The dispute started in the 1970's and gives every sign of continued vitality. The parties presently before the court are the plaintiff trustees of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund (the "Trustees" or "Funds") and defendant General Marine Transport Corporation ("General Marine"), a subsidiary of the holding company owned by members of the Berman family.

The Trustees seek a determination of the amounts owed in accordance with the summary judgment granted by this court

on December 4, 1981 which required General Marine to make payments for its employees for the period from 1976 to 1979. Both parties seek summary judgment on General Marine's counterclaim. Final judgment in favor of the Trustees and dismissing the counterclaim of General Marine will be entered in accordance with this opinion which constitutes findings of fact and conclusions of law.

Familiarity with the court's earlier opinion in this action and the opinions in related actions is assumed. After the December 4, 1981, 534 F.Supp. 120 opinion was filed, the Trustees discovered the books and records of General Marine, and after considerable delay, a one-day hearing was finally held on September 7, 1982 to resolve the amounts due in accordance with the earlier grant of summary judgment. Testimony was given by Eugene O'Connor ("O'Connor"), the Administrator of the Funds, Richard Siemerling ("Siemerling"), the auditor for the Funds, and Susan Frank ("Frank"), controller of General Marine. This was then followed on November 19, 1982 by argument on General Marine's motion for summary judgment on its counterclaim. By agreement of the parties, briefing was finally completed on or about February 18, 1983. Despite the wealth of past findings, certain facts should be restated as directly relevant to the present disposition.

In the mid-1970's Berman operated tugs, barges and tankers, and General Marine, a subsidiary of the family holding company, operated sludge vessels. Local 333 had unsuccessfully sought to organize Berman, but it was agreed prior to 1973 that the employees of General Marine would be covered by the collective bargaining agreement between Local 333 and the Marine Towing and Transportation Employers' Association (the "Association"). Berman used its employees interchangeably on all of its vessels including the sludge vessels during the period covered by the 1973-76 industry-wide collective bargaining agreement and payments were made to the Pension Fund of $124,286.44 and to the Insurance Fund of $75,918.33 covering all Berman employees. General Marine was a party to the agreement. All the General Marine and Berman employees

received whatever benefits accrued to them as a consequence of these payments.

In 1976 the Association and Local 333 entered into negotiations and an agreement was reached which purported to cover a "subsidiary company, an affiliated company or a company division in the Port of New York and vicinity." This provision and related events gave rise ultimately to Berman's antitrust litigation, *Berman Enterprises, Inc. v. Local 333*, 644 F.2d 930 (2d Cir.), *cert. denied*, 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 381 (1981), and more immediately, to General Marine's repudiation of the 1976-79 collective bargaining agreement (the "Agreement") between the Association and Local 333. General Marine was struck, the strike was terminated, and on May 13, 1976 General Marine wrote to the Administrator of the Funds as follows:

> Dear Mr. O'Connor:
>
> In August, 1975, as Administrator of the Pension and Welfare Funds, you took the position that the benefits of Local 333 members employed by this company under the plans terminated because of a dispute about the effectiveness of the Association's contract with Local 333 and General Marine.
>
> The effectiveness of the Association's contract with Local 333 upon General Marine Transport Corp. is again the subject of disputes and litigation between Local 333 and General Marine. General Marine wants to make pension and welfare payments for the Local 333 members employed by it, but in order to do so, we want the Trustees of the Pension and Welfare Funds to authorize the receipt of payments pending resolution of the disputes.
>
> Very truly yours,
>
> Peter M. Frank
> Vice President

No reply was forthcoming.

In the fullness of time the NLRB concluded that Berman was entitled to a separate bargaining unit, Case No. 2-RM-1774,

December 10, 1976, an election was held, and the Marine Engineers Beneficial Association ("MEBA") was elected as the bargaining representative for employees on Berman vessels. Local 333 then expelled the Berman employees. Berman and General Marine made no payments to the Funds and obtained coverage for their employees elsewhere. Local 333 complained to the NLRB of an unfair labor practice, the NLRB issued a complaint which the Second Circuit held on appeal to have been barred by the statute of limitations. *General Marine Transport Corp. v. NLRB*, 619 F.2d 180 (2d Cir.,1980).

This action by the Trustees seeking recovery of pension fund contributions under the contract initially was brought as a counterclaim in the Berman antitrust suit. After the Trustees were dropped as defendants in that action, the counterclaim was severed from the antitrust suit and asserted through an independent complaint filed on December 29, 1978. Jurisdiction is predicated on section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, and Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*.

The 1976-79 Agreement provided in Article I, Section 16 for payment by the Employer to the Insurance Fund and Pension Fund "for each of his Employees in the bargaining unit" and also provided in subparagraph (d) as follows:

> d. *Delinquent Employer.* If an Employer is delinquent for thirty (30) days in the payment of the contributions required of it under paragraphs "a" and/or "b" of this Section 16, the Administrator shall certify in writing to the delinquent Employer and to the Union the estimated delinquency due according to his records and the Union may terminate this agreement as to the delinquent Employer by mailing such Employer a notice to that effect by certified mail, which notice shall specify the date as of which the contract shall be so terminated. The Union will give such notice as its counsel may determine is required by law, if any, and if no notice is required by law, sufficient notice for the Employer to tie up its vessels in safety.

Thereupon, the contract shall terminate as to such delinquent Employer with the same force and effect as though the termination date set forth in the Union's notice was the date upon which this contract is to terminate with the said delinquent Employer.

Nothing contained herein, however, shall prevent the Union from immediately striking the said delinquent Employer until all monies owed hereunder by the delinquent Employer are paid together with interest at 2% above the prevailing rate charged by CITICORP BANK to its prime customers from the date on which the contribution should have been paid; and if the Trustees incur legal expense in enforcing payment of such delinquent amount, the Trustees shall also be entitled to recover their reasonable counsel fees and other expense incurred in effecting collection. Such strike shall not violate the "no strike clause" and shall not be subject to the grievance and arbitration machinery of this contract.

In the event that the amount of delinquency alleged to be due by the Funds' Administrator is questioned by the Employer, the Employer may post a surety company bond in a form satisfactory to the Administrator or in lieu thereof, a cash deposit, for the amount certified by the Administrator of the Funds, in which event the Union shall not strike the delinquent Employer before the date of termination set forth in the aforesaid notice and the amount in dispute shall be resolved in accordance with the grievance and arbitration machinery of this contract.

The Agreement provides that it "applies only to all licensed and unlicensed Employees, employed on tugboats and self-propelled lighters owned or operated by the Employers . . . "

General Marine contends that no damages are due because the Trustees have not complied with the notice provisions of the Agreement. Alternatively, General Marine asserts that the Trustees have overcharged General Marine in four major areas: (1) contributions to the insurance fund; (2) calculation of the hours paid; (3) the participation of captains; and (4) interest penalties.

The liability of General Marine for contributions to the Funds has already been determined by the prior opinion. However, that liability is now resisted on the ground that the notice required by Section 16 of the Agreement was never given. Overlooking the propriety of considering the issue at this time, I note that there is evidence that some notice was in fact given. The decision of the Administrative Law Judge, affirmed by the NLRB, stated:

> On January 19, 1977, Local 333 wrote Respondent:
>
> > As you know, the U.S. Labor Board ruling effectively determined that this Union is the bargaining representative for the men employed on board your sludge vessels.
> >
> > You have withheld pension insurance payments for these employees since last April during the pendency of the Labor Board case. We herewith demand that said payments be reinstituted, including all arrears with interest from their due date.
>
> On February 11, 1977, Local 333's attorney wrote Berman and Respondent concerning delinquent pension plan contributions relating to the two companies stating:
>
> > As I advised you in today's telephone conversation, this letter is to make formal demand on behalf of the United Marine Divison, Local 333, ILA, AFL-CIO and the New York Marine Towing and Transportation Industry Pension Fund for delinquent pension plan contributions for non-union members of the bargaining unit as well as bargaining unit employees from 1970 to date. An immediate response from your clients is requested.

In addition, the filing of the counterclaim by the Trustees in the antitrust action certainly alerted General Marine to the Trustees' position.

General Marine elected to stand on its effort to terminate the Agreement entered by the Association on its behalf, and under such circumstances the Trustees were entitled to have the

termination determined without notice setting forth the precise delinquency asserted. As the Administrator put it, "General Marine had ceased to be a contributing employer." The notice under such circumstances was a useless formality and indeed the Trustees had no basis upon which the delinquency could be stated. In the face of General Marine's attempted withdrawal from the Association, the notice of deficiency was not a necessary condition to this action or the Trustees' recovery. To hold otherwise would be to ignore the realities of the posture of the parties during the period in question.

Further, regardless of the sufficiency of these acts to constitute notice under Section 16, when a party to a contract has both repudiated the agreement and purported to terminate it, without justification, then the other party need no longer satisfy the conditions that might otherwise be required of it. *See Cradlock v. Greenhut Construction Co.*, 423 F.2d 111 (5th Cir.1970); *Allegheny Valley Brick Co. v. C.W. Raymond Co.*, 219 F. 477 (2d Cir.1914); *Commercial Metals Co. v. International Union Marine Corp.*, 294 F.Supp. 570(S.D.N.Y. 1968); 4 *Corbin on Contracts* § 977 (1951 and Supp.1982); 5 *Williston on Contracts* § 699 (1961); *Restatement (2d) Contracts*, § 255.

Under the 1976-79 Agreement establishing the Funds, the Trustees are granted the authority "to prescribe rules governing the amount to be contributed for Employees who do not work a full month, provided that such rules may not obligate an Employer to contribute more than a full monthly contribution . . . " Under this authority the Trustees calculated the payments due by reason of persons employed on sludge vessels for less than 96 hours a month by totalling the hours of all employees who were paid for less than 96 hours in a particular month and dividing the aggregate figure by 96. The resulting number was added to the number of employees paid for over 96 hours to yield the total number of full contributions required to be made for that month.

The evidence adduced at the hearing established that General Marine had received communications from the Funds "to all contributing Employers" setting forth this method of calcula-

tion. The evidence also demonstrated that under the method utilized by Frank for General Marine, there were unjustifiable exclusions of employment hours. The Trustees were empowered to prescribe regulations for employees paid for less than 96 hours a month, they exercised this power and communicated the procedures to all participating employers, and General Marine was aware of them. Under these circumstances, the Trustees' method of calculation for those having less than 96 paid hours in a month is proper.

The Trustees also adopted rules calling for payments on the basis of "hours paid for," rather than hours worked, a difference which is significant because of the General Marine practice of paying their employees for each hour on the boat, whether or not on duty. The General Marine employees worked one week on, one off and received no overtime or weekend benefits. General Marine urges that a calculation on the basis of a 12-hour day, which would reduce the monies owed by General Marine by $2,054.52, is the appropriate measure since it accords with the treatment given other members of the Association. However, this position overlooks certain differences between General Marine's operations and those of other Association members. Again, a uniform procedure is prescribed by the Trustees and that procedure requires contributions for all hours paid for. General Marine's alleged miscalculation in the past is no justification for miscalculating the contributions presently due.

General Marine asserts that it should not be required to make contributions for captains. Its argument is as follows: section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), requires that the contributions be used for the "sole and exclusive benefit of the employees"; the term "employee" in LMRA § 302(c)(5) is defined by LMRA § 501(3), 29 U.S.C. § 142(3), which refers to the definition in section 2(3) of the National Labor Relations Acts ("NLRA"), 29 U.S.C. § 152(3); NLRA § 2(3) defines "employee" as excluding "any individual employed as a supervisor"; captains are "supervisors" within NLRA § 2(11), 29 U.S.C. § 152(11); therefore, "employees"

under LMRA § 302(c)(5) does not include "supervisors," or in this case, captains.

Courts have rejected such a literalistic and automatic application of the NLRA definitional provisions to the various provisions of the LMRA. *See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass,* 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971); *United States v. Ryan,* 350 U.S. 299, 76 S.Ct. 400, 100 L.Ed. 335 (1956); *Crilly v. Southeastern Pa. Transp. Authority,* 529 F.2d 1355 (3d Cir.1976); *United States v. National Marine Engineers' Beneficial Ass'n,* 294 F.2d 385 (2d Cir.1961). Specifically, several courts have held that the "supervisor exclusion" of NLRA § 2(3) is inapplicable to other provisions of the LMRA, *see, e.g., Reiherzer v. Shannon,* 581 F.2d 1266 (7th Cir.1978), and that the exclusion was meant to apply only to proyisions of the NLRA, *see e.g., District 2, Marine Engineers Beneficial Ass'n v. Amoco Oil Co.,* 554 F.2d 774 (6th Cir.1977); *Isbrandtsen Co. v. District 2, Marine Engineers Beneficial Ass'n,* 256 F.Supp. 68 (E.D.N.Y.1966).

Based on these authorities, I conclude that the payments due include contributions for captains. It should be noted that Frank testified that over the many years that General Marine made payments to the Funds until April 1, 1976, it always paid for captains. General Marine clearly understood that payments for captains were required under the collective agreements to which it was a party.

Pursuant to section 502(g) of ERISA, 29 U.S.C. § 1132(g)(2), the Trustees are also entitled to double interest on defendant's delinquent contributions. 29 U.S.C. § 1132(g)(2) provides:

> (g)(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions
>
> (C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under Section 6621 of Title 26.

29 U.S.C. § 1145 provides:

§ 1145. Delinquent contributions. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such a plan or such agreement.

The so-called "double-interest" remedy derives from the combination of subsections (B) and (C)(i) of 29 U.S.C. § 1132(g)(2). *Central States, Southeast and Southwest Areas Pension v. C.J. Rogers Transportation Co.*, 544 F.Supp. 308, 313 (E.D.Mich.1982); *Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, 522 F.Supp. 919, 921 n. 2 (E.D.Mich.1981). The rate specified in section 16(d) of the Agreement quoted above is 2% above the Citicorp prime rate. General Marine's argument that the interest provision in the Agreement is limited to those situations in which the union chooses to exercise its right to strike is unpersuasive. The entire paragraph deals with the remedies available in the case of employer delinquency, including interest.

Several cases have held the interest and attorneys' fees requirements of the ERISA amendments of 1980 to section 502(g), Pub.L. No. 96-364, § 306(b)(2), 94 Stat. 1295 (amending 29 U.S.C. § 1132(g) (1976), applicable to payments of contribution delinquencies which preceded enactment of the statute. In *Alco,* the first case to fully treat the question, the trustees sought the double interest and attorneys' fees mandated by section 502(g), following a summary judgment adjudicating the employer's liability for unpaid contributions in the period April 1, 1976 to March 31, 1978. As in the instant action, during the pendency of the suit for contributions, the 1980 amendments to ERISA became effective. The trustees urged that the provisions of section 502(g) applied and the court, after well-reasoned analysis, agreed. The court held:

> The double interest proviso of the 1980 amendments must likewise be given retroactive effect, making it applicable to cases pending on its effective date. As the Court has already described, Congress clearly intended this provision to be remedial; it arose out of an acute concern over the adverse impact of delinquencies on employee benefit plans and was intended to discourage failure to make payments when due. Congress was aware that in some instances there might be a legitimate dispute over the exact amount currently owing, but determined in all instances of delinquencies to require payment of double interest as compensation for the damage occasioned by the failure of a trust to receive payment as due. Importantly, Congress did not arbitrarily choose double interest as the amount due but rather listed it as an alternative: Section 502(a) requires that the court award the greater of double interest on the amount specified in the agreement of the parties up to 20% of the amount of delinquent contributions.

522 F.Supp. at 930-931 (citations omitted).

The *Alco* approach to section 502's remedial provisions has been followed in *San Pedro Fishermen's Welfare Trust Fund Local 33 v. DiBernardo,* 664 F.2d 1344 (9th Cir.1982), *Central*

*States, Southeast and Southwest Areas Pension v. C.J. Rogers Transportation Co.*, 554 F.Supp. 308, 312 (D.Mich.1982), and *Peick v. Pension Benefit Guaranty Corp.*, 539 F.Supp. 1025, 1045 n. 37 (D.Ill.1982). General Marine relies on *Hammond v. James W. Griffin Co., Inc.*, 520 F.Supp. 162 (N.D.Ga.1981), in which the court declined to apply the 1980 amendments to a case commenced prior to their enactment. *Id.* at 168. In light of the dearth of analysis in that decision and based on the authorities set forth above, I conclude that retroactive application is appropriate here and that General Marine has not demonstrated that application of the double-interest provision will work a "manifest injustice."

Parenthetically, it should be noted that General Marine asserts that the penalty interest rate provision under ERISA may not be considered because the provision was not cited in the Trustees' complaint and because its application was not anticipated by General Marine. However, this action was brought under the LMRA and ERISA, and in connection with the liability and damages issues, both parties have based a number of arguments on ERISA. The Trustees specifically cited section 502 of ERISA, 29 U.S.C. § 1132, in their motion papers on the liability question, pointing out that the section "deals with defaults in employer contributions to employee benefit funds." In its motion for summary judgment against the Trustees on liability, General Marine *itself* requested relief pursuant to 29 U.S.C. § 1132(g). As was the case in *Central States, Southeast and Southwest Areas Pension v. C.J. Rogers Transportation Co.*, 544 F.Supp. 308, 309 (E.D.Mich.1982), the Funds have sued to collect unpaid contributions under ERISA, 29 U.S.C. § 1001 *et seq.*, and having previously found that the Funds are entitled to the contributions, I must award the remedy sought for General Marine's failure to make payments, a remedy authorized by § 1132(g)(2) of ERISA. *See id.* at 312.

No authority has been advanced by General Marine to support its proposition that a collective bargaining agreement should not be enforced because it would require the non-contributing employer to pay twice—as indeed General Marine

will be required to do here. In a period when choices were difficult and conflicting, General Marine in this court's view made the wrong choice and must now suffer the penalty for its ineffective withdrawal from the Association. The undeniable windfall to the Trustees results from the terms of the Agreement and the authorities as they are understood by the court, *see Brogan v. Swanson Painting Co.,* 682 F.2d 807 (9th Cir.1982); *Audit Services, Inc. v. Rolfson,* 641 F.2d 757 (9th Cir.1981); *Local 9, International Union of Operating Engineers v. Siegrist Construction Co.,* 458 F.2d 1313 (10th Cir.1972). General Marine's contractual obligations to the fund cannot be extinguished by its own unilateral arrangements for other forms of insurance coverage or even the payment of claims under that coverage. Indeed, as the Trustees point out, such a defense would render the Act and collective bargaining agreements toothless.

The General Marine counterclaim seeks repayment from the Trustees for the contributions made for Berman employees during the 1973-76 period. There is no question but that payments were made and the parties do not dispute the amount of the payments. The only question is whether they were properly made by General Marine and accepted by the Funds.

General Marine relies on *Moglia v. Geoghegan,* 403 F.2d 110 (2d Cir.1968), *cert denied,* 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969), and subsequent decisions applying *Moglia,* which hold that under section 302 of the LMRA, 29 U.S.C. § 186(c)(5)(B),[1] an employee benefit fund may not accept

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1 29 U.S.C. § 186(c)(5) states in relevant part:

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compen-

contributions from an employer unless that employer is party to a written document specifying the basis of contributions. General Marine argues that it is entitled to restitution under *Moglia* because the Regional Director found that the employees on Berman vessels constituted a separate bargaining unit and because Berman was not a party to the 1973-76 collective bargaining agreement.

The Regional Director determined that there was no contract bar to an election among the tug and barge employees. The "contract bar" doctrine is used by the NLRB for representation election purposes and General Marine has not presented authority for extending its application to issues concerning section 302 of the LMRA.

Moreover, General Marine's payment for the Berman employees and the Fund's acceptance of the contributions at issue do not contravene the principles set forth in *Moglia*. *Moglia*

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sation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the adminstration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the fund held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

involved a claim to a pension trust fund by the widow of an employee of an employer who had for many years contributed to the fund on behalf of its employees. The trustees of the fund denied the claim and attempted to return those contributions made by the employer, the trustees having discovered that the employer had never entered into a collective bargaining agreement or pension trust with the union.

This is not a suit arising out of a denial of benefits by the trustees. Here contributions were made by General Marine, a party to the collective bargaining agreement, those contributions were accepted, benefits were provided, and pension credits were earned even to the point of vesting. Every month, General Marine submitted written, signed reports to the Trustees, showing the employees for whom employment contributions were made. All such employees were on the General Marine payroll, not the payroll of any other company. The work performed by these employees aboard tugs and barges was the very work covered by the collective bargaining agreement which provided coverage to employees on vessels "owned or operated by the Employers" in the Port of New York and vicinity. To the extent that General Marine employees worked aboard the tugs and barges, General Marine may be said to have "operated" the vessels for collective bargaining agreement purposes. Berman and General Marine interchanged moneys, vessels and employees. *See Berman Enterprises, Inc. v. Local 333,* 644 F.2d 930, 936 (2d Cir.), *cert. denied*, 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 381 (1981), ("there was in reality but a single employer, with interrelated operations, common management, and centralized control of labor relations . . ."). Under these circumstances, *Moglia* is satisfied by the 1973-76 collective bargaining agreement.

General Marine also argues that the retention by the Funds of contributions made on behalf of the employees on Berman vessels contravenes section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), which provides that moneys paid to a trust fund by an employer must be "for the sole and exclusive benefit of the employees of such employer." General Marine contends that section 302(c)(5) requires that a voluntarily departing group be

permitted to take a portion of the fund with them, either through direct repayment of contributions or through segregation of assets to be administered under a new set of eligibility rules tailored to that particular group.

General Marine relies primarily upon *Alvares v. Erickson*, 514 F.2d 156 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975), in which employers together with their employees withdrew from a bargaining unit and trust fund. The suit was brought as a class action by members of the local, seeking an allocation or transfer of that portion of uncommitted reserves attributable to contributions made by employees on behalf of the local's members prior to withdrawal. The district court dismissed the case for lack of jurisdiction and the Ninth Circuit reversed, holding that there was jurisdiction under sections 301(a) and 302(e) of the LMRA, 29 U.S.C. §§ 185(a)[2] and 186(e)[3]. The court "express[ed] no opinion as to the merits of plaintiff's claim[s]." 514 F.2d at 167. However, the Ninth Circuit noted that jurisdiction under section 302(e) had been found by courts in actions involving "structural" deficiencies in the relevant trust, deficiencies which caused the trusts to violate the "sole and exclusive benefit" provision of section 302(c)(5), and not in cases involving only questions of day-to-day fiduciary adminstration of welfare and pension funds. The *Alvares* court went on to find that the claim before it was a "structural" matter and therefore that jurisdiction existed.

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2 29 U.S.C. § 185(a) reads as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

3 29 U.S.C. § 186(e) states in relevant part:

> The district courts of the United States . . . shall have jurisdiction, for cause shown, . . . to restrain violations of this section . . .

Even if I were to interpret the *Alvares* decision as one going beyond the jurisdictional question, that is, as suggesting that the plaintiffs' claim was meritorious, the facts there are distinguishable from those in the case at bar. In *Alvares*, a substantial number of the employer parties to the trust had withdrawn. Those employers and their employees agreed to set up a new trust. There was some indication that the trustees of the prior trust had forfeited certain credits of the employees who left. The Ninth Circuit concluded that these changes and others involved "a rather drastic change in [the prior trust's] structure." *Id.* at 165.

Here, General Marine was not one of the many employers who with their employees withdrew and agreed to set up a new trust. After March 31, 1976, the employees in question elected a new bargaining representative, but General Marine itself, as previously found by this court, did not cease to be a covered employer. When the contributions by General Marine for sludge boat employees through March, 1979 are made, the Trustees assert that the employees whose employment generated such payments will receive appropriate pension credit for the 1976-79 period.

General Marine has not demonstrated that there will be a loss or forfeiture of benefits under these circumstances. As made clear in the affidavit of Eugene O'Connor, Administrator of the Funds, the Berman employees whose employment generated the contributions in question received full coverage and credit to which they were entitled. The employees received full entitlement to benefits based on General Marine's payment to the Insurance Fund for the entire 1973-1976 period for which payments were made. Their membership or non-membership in Local 333 had no bearing on that entitlement. The expelled employees received pension credit for the periods for which contributions were made. The pension credit has not been extinguished or impaired. Some of the expelled employees are fully vested, others are close to vested status and may achieve it, and all remain fully credited for and service earned and contributed for prior to April 1, 1976.

Although I conclude that section 302(c)(5) does not require transfer or segregation of contributions in this case for the reasons set forth above, I note that General Marine has not indicated how as an employer it even has standing to claim that contributions should be paid into a trust administered for the benefits of the expelled employees. Also, General Marine has argued that based on section 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii),[4] which permits an employer who made contributions to a "multiemployer plan by a mistake of fact or law . . . " to obtain a refund of such contributions, General Marine is entitled to restitution. According to General Marine, the "mistake of fact or law" here is that contributions were made in violation of 29 U.S.C. § 186(c)(5). However, having found no such violation, section 403(c)(2)(A)(ii) of ERISA provides no basis for restitution.

The amount of damages awarded to the Funds are to be determined in accordance with this opinion and for the reasons stated above, General Marine's counterclaim is dismissed.

Submit judgment on notice within ten (10) days.

IT IS SO ORDERED.

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4 29 U.S.C. § 1103(c)(2)(A)(ii) provides as follows:

> (c)(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under section 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.
>
> (2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter— . . . (ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

**Opinion of the District Court dated September 19, 1983**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

Sept. 19, 1983

No. 78 Civ. 6277 (RWS)

[SAME TITLE]

OPINION

SWEET, *District Judge.*

By decision dated March 31, 1983, plaintiff trustees of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund (the "Trustees") were awarded damages in connection with this action, and the counterclaim of defendant General Marine Transport Corporation ("General Marine") was dismissed. 564 F.Supp. 1064. Judgment was entered on May 19, 1983. On May 25, General Marine filed a timely motion pursuant to Rule 52(b) Fed.R.Civ.P. seeking to amend the judgment. On June 6 and June 15, General Marine submitted supplemental papers, asserting additional grounds for amendment pursuant to Rules 52(b) and 60(b) Fed.R.Civ.P. To the extent that General Marine repeats its arguments on the issue of damages which were rejected by this court in its decision of March 31, 1983, no basis has been advanced requiring a reconsideration of the prior determination. The new ground set forth, the recent Supreme Court ruling in *DelCostello v. International Brotherhood of Teamsters*, ___ U.S. ___, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), does not require reversal and, as set forth below, the motion is denied.

General Marine has argued that *DelCostello*, which applied the six-month limitations period prescribed by section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), requires a reversal of this court's decision applying

the six-year limitations period for breach of contract actions in New York, N.Y.Civ.Prac.Law § 213(2), to this case. *O'Hare v. General Marine Transport Corp.*, 534 F.Supp. 120 at 125 (S.D.N.Y.1981).

In *DelCostello*, the Supreme Court held that in an action against both an employer for breach of a collective-bargaining agreement under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and a union for breach of its duty of fair representation, a cause of action implied under the NLRA, 29 U.S.C. § 151 *et. seq.*, the six-month statute of limitations for making charges of unfair labor practices to the NLRB, 29 U.S.C. § 160(b), applies. 103 S.Ct. at 2285. Such an action is typically labeled a "hybrid 301/fair representation" claim. *Id.* at 2291. *DelCostello* has thus far been considered in the context of these hybrid claims only. *See, e.g., Storck v. International Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir.1983); *Larry v. Penn Truck Aids*, 567 F.Supp. 1410 (E.D.Pa.1983); *McPherson v. United States*, 2 Cl.Ct. 670 (1983). No cases have been cited or located in which the *DelCostello* reasoning has been applied to actions against the employer for breach of only the collective bargaining agreement.

*DelCostello* appears to turn on the peculiar nature of a "duty of fair representation" action. This duty is itself a creature of the NLRA, and the nexus between the NLRA and the duty imposed on unions led the Court in *DelCostello* to analogize breach of the duty of fair representation claims to claims of unfair labor practices and to select as the appropriate limitations period the six-month period for making charges of unfair labor practices to the NLRB prescribed by section 10(b) of the NLRA. *Id.* at 2293.

There is indeed support for this interpretation of *DelCostello* in the decision itself. In *Auto Workers v. Hoosier Corp*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966), the Court held that a straightforward suit under section 301 of the LMRA, 29 U.S.C. § 185, for breach of a collective bargaining agreement by an employer is governed by the state statute of limitations;

there, as here, the applicable state statute was six years. *Id.* at 707, 86 S.Ct. at 1114. The court in *DelCostello* quoted with approval the following portion of *Hoosier*:

> The present suit is essentially an action for damages caused by an alleged breach of an employee's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question. 383 U.S. at 705, n. 7, 86 S.Ct. at 1113, n. 7 (citations omitted).

103 S.Ct. at 2289-90. The Court in *DelCostello* went on to say:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere.

*Id.* at 2294. Since this action essentially fits the description in *Hoosier* quoted above, *DelCostello* does not require a different result from that reached in this court's decision of December 4, 1981, which applied the six-year limitations period.

For the reasons stated herein, General Marine's motion is denied.

IT IS SO ORDERED.

**Opinion of the District Court dated February 3, 1984**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

OPINION

SWEET, *D.J.*

Plaintiff Trustees ("Trustees") of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund (the "Funds") have moved for an award of attorney's fees pursuant to 29 U.S.C. § 1132(g)(2) and this court's judgment in the Trustees' favor. For the reasons given below, the Trustees are granted an award of $71,694.37 as attorney's fees.

The long history of this dispute and the associated litigation will not be repeated again here. It is enough to note that following opinions dated December 4, 1981 and March 31, 1983 and a one-day trial on the issue of damages, this court entered judgment for the Trustees on May 19, 1983. The counterclaim of defendant General Marine Transport Corp. ("General Marine") was dismissed in the March 31, 1983 opinion, and our opinion dated September 19, 1983 denied General Marine's motion to amend the May 19, 1983 judgment.

In their motion for attorney's fees, the Trustees request $96,519.87 for work by seven attorneys and a law clerk on this litigation, including disbursements.[1] In response, General

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1. The following table sets out the rates and hours composing the Trustees' request for attorney's fees.

| *Attorney* | *Hours* | *$ Rate* | *$ Amount* |
|---|---|---|---|
| Seymour M. Waldman | 62.5 (78-81) | 150 | 9,375.00 |
| | 199.0 (82-) | 175 | 34,825.50 |
| Lois Waldman | 20.25 | 125 | 2,531.25 |
| Judith P. Broach | 1.0 | 125 | 125.00 |

*(footnote continued)*

Marine contends that the request is excessive because (1) the Trustees are not entitled to an award for their work defending against General Marine's counterclaim; (2) the Trustees have not sufficiently justified the "unusually large" amount of time claimed for the lawyers supporting Seymour M. Waldman ("Waldman"), the Trustees' lead lawyer; (3) the rates requested for Judith Broach ("Broach"), Daniel Engelstein ("Engelstein"), Andrew Schulz ("Schulz") and Deborah H. Karpatkin ("Karpatkin") are excessive, and (4) the claim of 150 hours for Roman Beck ("Beck") is excessive given the inadequate documentation of how he spent his time.

First, the question of the counterclaim must be resolved. Section 1132(g)(2), the statute under which the Trustees seek the award, states:

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| | | | |
|---|---|---|---|
| Daniel Engelstein | 16.5 | 125 | 2,062.50 |
| Andrew Schulz | 60.75 | 100 | 6,075.00 |
| Deborah H. Karpatkin | 171.75 | 100 | 17,175.00 |
| Law Clerk | 5.0 | 40 | 200.00 |
| Roman Beck | 150.0 | 150 | 22,500.00 |
| TOTAL: | | | 94,869.25 |

The Trustees' request for disbursements is as follows:

*For lawyers other than Beck*

| | |
|---|---|
| Photocopying and binding | $ 727.55 |
| Long distance telephone calls | 8.56 |
| Trial transcript | 365.70 |
| Messengers | 94.65 |
| Postage | 14.97 |
| Overtime and transportation expenses | $ 334.15 |
| SUBTOTAL: | $1,545.58 |

*For Beck*

| | |
|---|---|
| Xerox | 47.55 |
| Postage | 2.49 |
| Fares | 1.50 |
| Messengers | 53.50 |
| SUBTOTAL: | 105.04 |
| DISBURSEMENT TOTAL: | $ 1,650.62 |
| TOTAL REQUESTED AWARD: | $96,519.87 |

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> * * *
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant . . . .

Section 1145 of Title 29 states:

> § 1145. Delinquent contributions
>
> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

In the complaint the Trustees claimed that General Marine owed pension and health insurance contributions to the Funds under a collective bargaining agreement that purported to cover the period April 1, 1976 through March 31, 1979. By counterclaim, General Marine asserted that, from April 1, 1973 through March 31, 1976, the Funds had improperly collected pension and health insurance contributions from General Marine on behalf of seamen who worked on vessels operated by a General Marine affiliate and who became part of a separate bargaining unit in 1976 and elected a separate union representative. General Marine claimed that (1) the Funds' collection and retention of these contributions, made for persons not covered by a written labor contract, violated § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186, because that section prohibits the making or receiving of payments to trust funds without a written basis for the payments, and that the contributions should be returned to General Marine, or (2) because of the withdrawal of these seamen from the bargaining unit for which funds had been

collected, § 302 requires that the funds contributed on behalf of these seamen be segregated and administered for the benefit of the employees for whom the contributions were made. There was no dispute that General Marine had in fact made the disputed payments.

In the March 31, 1983 opinion, this court dismissed the counterclaim on the merits. The parties to the counterclaim were the same as those to the main claim. Both the complaint and counterclaim arose out of collective bargaining agreements between Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO and the Marine Towing and Transportation Employers Association requiring employer contributions to the Funds.

The parties were unable to discover a case considering whether § 1132(g)(2) covers counterclaims such as this one, and this court is aware of none. Indeed, cases interpreting any aspect of § 1132(g)(2), which became law in 1980, are rare. However, the wording and purpose of the statute indicate that attorney's fees should be awarded for the services rendered defending the plaintiffs against the counterclaim.

Section 1132(g)(2) grants attorney's fees and costs "of the action" for "any action" successfully brought "on behalf of [an employee benefit] plan to enforce section 1145 . . . ." Section 1145 requires employers obligated to contribute to a multiemployer plan to make such contributions. The Senate Committee on Labor and Human Resources, in its report on S. 1076, which contained the sections that later were passed as §§ 1132(g)(2) and 1145, stated in a report on the bill that "Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans." The committee explained that:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. *Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans'*

*entitlement to the contributions*. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contribution will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies. [emphasis added]

Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S.1076, The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration* (Comm. Print 1980) at 43-4, *cited in Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, 522 F. Supp. 919, 928 (E.D.Mich. 1981).

The counterclaim was part of an action brought to collect funds that were delinquent under § 1145. General Marine's assertion of the counterclaim against the Trustees in their effort to collect delinquent pension and insurance contributions seems well described by the Senate committee's observation in the underlined language above, which indicates the intent of Congress to award attorney's fees for the defense of counterclaims such as this one.

Turning to the requested rates and hours of the attorneys, General Marine contends that the requested rate of $125/hour for Broach and Engelstein and $100/hour for Schulz and

Karpatkin is excessive. Broach, a partner at the law firm of Vladeck, Waldman, Elias & Engelhard ("Vladeck"), received a J.D. from the University of San Francisco in 1975 and has an expertise in pension fund matters. Engelstein received a J.D. from Boston College in 1976, is a member of the Massachusetts, New York and Southern District bars, worked in 1977-79 as staff counsel to a National Labor Relations Board member and is a partner in the Vladeck firm. Schulz, who was an associate at Vladeck from 1980 to 1982, received a J.D. from New York City University in 1981 and is a member of the New York and Southern District bars. Karpatkin, an associate at Vladeck from 1981 to 1983 and now staff counsel to the New Jersey American Civil Liberties Union, received a J.D. from Columbia University in 1980 and is a member of the New York and Southern District bars.

We find that a rate of $100/hour for Broach and Engelstein and $65/hour for Schulz and Karpatkin is appropriate. Schulz has been a lawyer for only two years and Karpatkin for three. No information has been provided to suggest that either had previous experience in this area of the law. In addition, the Trustees have submitted no data concerning these attorneys' billing rates in other matters. Few, if any, court apearances were required of them. These rates constitute reasonable attorney's fees under § 1132(g)(2)(D). *Cf. Hilf v. New York Housing Authority*, No. 82-6499, slip op. at 2 (S.D.N.Y. February 9, 1983) (rates of $100/hour and $90/hour for lawyers with seven and six years experience in § 1983 action).

Waldman, the Trustees' lead counsel in this matter and now a partner at Vladeck, received his J.D. from Columbia University in 1950, where he was an editor of the *Law Review*. He has practiced primarily in the area of labor law. Waldman's requested rates are appropriate.

Lois Waldman received an LL.B. from Columbia University in 1950, where she was an editor of the *Law Review*. She has extensive labor litigation experience. Her requested rate of $125/hour is appropriate.

The time records the Trustees have submitted by affidavit are sufficient to justify the number of hours claimed for these six lawyers.

Beck, who is counsel to the Funds, is the only one of the Trustees' attorneys who has not submitted time records. Instead, Beck has described his work on this matter by stating in an affidavit that he (1) "reviewed and at times revised" papers; (2) had conferences with an auditor concerning a motion by the Trustees, and reviewed the auditor's report with Waldman and an accountant; (3) had conferences with a Fund administrator; (4) attended the hearing and oral argument before this court; and (5) engaged in legal research. Beck estimates that this work took 150 hours. Beck has been a member of the New York bar since 1927, and has specialized in labor law for most of his career. Beck requests a rate of $150/hour. Beck has provided no information on his regular billing rates.

Although, at the time Beck performed his work, this Circuit did not have its current rule requiring contemporaneous time records for an attorney's fees award, *see New York Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983), it had a strong preference for such records. *Id.* Beck's general description of his work fails to meet even the looser requirements that prevailed before *Carey*. Based on Beck's affidavits and his appearances before this court, we conclude that an award based on 50 hours of work at $125/hour is appropriate.

The above calculations suggest a total award of $71,694.37.[2]

2. *Attorneys' Time*

| *Attorney* | *Hours* | *$ Rate* | *$ Award* |
|---|---|---|---|
| Waldman | 62.5 (78-81) | 150 | 9,375.00 |
| | 199.0 (82-) | 175 | 34,825.50 |
| Lois Waldman | 20.25 | 125 | 2,531.25 |
| Broach | 1.0 | 100 | 100.00 |
| Engelstein | 16.5 | 100 | 1,650.00 |
| Schulz | 60.75 | 65 | 3,948.75 |
| Karpatkin | 171.75 | 65 | 11,163.75 |
| Law Clerk | 5.0 | 40 | 200.00 |
| Beck | 50.0 | 125 | 6,250.00 |
| SUBTOTAL: | | | $70,043.75 |

Final Computation

| *Source* | *$ Amount* |
|---|---|
| Attorneys' time | 70,043.75 |
| Disbursements | 1,650.62 |
| TOTAL: | 71,694.37 |

Because the quality of representation, risk and complexity of this matter were average, we decline to adjust this "lodestar" figure upward or downward. *See Cohen v. West Haven Board of Police Commissioners*, 638 F. 2d 496, 505 (2d Cir. 1980).

Submit judgment on notice to this effect within ten (10) days.

IT IS SO ORDERED.

DATED: New York, N.Y.
February 3, 1984.

/s/ R. SWEET
ROBERT W. SWEET
*U.S.D.J.*

**Order Denying Petition for Rehearing**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 83-7848

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the seventh day of September one thousand nine hundred and eighty-four.

JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND

*Plaintiffs-Appellees*,

—v—

GENERAL MARINE TRANSPORT CORP.

*Defendant-Appellant*.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant, General Marine Transport Corp.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

**Judgment of the District Court**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6277 (RWS)

JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT M. SANDERS and THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING AND TRANSPORTATION INDUSTRY PENSION FUND AND INSURANCE FUND,

*Plaintiffs*,

—against—

GENERAL MARINE TRANSPORT CORPORATION,

*Defendant*.

JUDGMENT

This action having come for hearing before the Court, Honorable Robert W. Sweet, presiding, and this Court having, by opinion dated December 4, 1981, granted plaintiffs Trustees' motion for summary judgment, requiring defendant to make pension and insurance fund contributions for its employees for the period April 1, 1976–March 31, 1979, and all the remaining issues having been duly heard, and the Court having filed an opinion constituting findings of fact and conclusions of law, dated March 31, 1983, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs Trustees' motion for partial summary judgment on defendant's counterclaim seeking repayment of contributions is granted, and the counterclaim is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that, as provided by 29 U.S.C. § 1132(g)(2)(A), plaintiffs trustees recover from defendant the sum of $87, 903.46 such sum being comprised of the sums of $60,001.12 and $27,902.34, which figures represent, respectively, the Pension and Insurance Fund contributions due for the period April 1, 1976 to March 31, 1979; and it is further

ORDERED, ADJUDGED AND DECREED that, as provided by 29 U.S.C. § 1132(g)(2)(B), plaintiffs Trustees recover from defendant the sum of $77,202.49, such sum being comprised of the sums of $52,661.00 and $24,541.49, which figures represent, respectively, the interest on the delinquent Pension and Insurance Fund contributions, calculated from due date of contributions through April 30, 1983; and it is further

ORDERED, ADJUDGED AND DECREED that, as provided by 29 U.S.C. § 1132(g)(2)(C)(i), plaintiffs Trustees recover from defendant the additional sum of $77,202.49, such sum being equal to the total interest due pursuant to the third decretal paragraph; and it is further

ORDERED that plaintiffs Trustees shall recover from defendant any additional interest which shall accrue subsequent to April 30, 1983, *to the date judgment is entered*, in accordance with 29 U.S.C. § 1132(g)(2)(B), and that such sum shall be doubled, in accordance with 29 U.S.C. § 1132(g)(2)(C)(i); and it is further

ORDERED that, as provided by 29 U.S.C. § 1132(g)(2)(D), plaintiffs Trustees shall recover from defendant their reasonable attorneys' fees and costs in this action, which sum shall be determined upon plaintiffs Trustees' application for same.

Dated: New York, New York
May 17, 1983

/s/ R. SWEET
*United States District Judge*

**Supplemental Judgment of the District Court**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 6277 (RWS)

[SAME TITLE]

SUPPLEMENTAL JUDGMENT

Plaintiff Trustees of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund ("Trustees"), having moved this Court for an award of attorneys' fees pursuant to 29 U.S.C. Section 1132(g)(2) under the sixth decretal paragraph of this Court's judgment dated May 17, 1983 in the Trustees' favor; and the attorneys for the Trustees having submitted to the Court their moving papers in support of said motion and the attorneys for defendant General Marine Transport Corporation having submitted to the Court their papers in opposition thereto; and this Court, Hon. Robert W. Sweet presiding, after due deliberation having rendered its Opinion and Order dated February 3, 1984, granting the plaintiff Trustees' motion, and awarding the Trustees' attorneys' fees in the amount of $70,043.75, plus disbursements in the amount of $1,650.62, aggregating a total of $71,694.37; it is

ORDERED, ADJUDGED AND DECREED that the plaintiff Trustees of the New York Marine Towing and Transportation Industry Pension Fund and Insurance Fund have judgment against defendant General Marine Transport Corporation for

attorneys' fees and costs in this action in the amount of $71,694.37.

Dated: New York, New York
February 21, 1984

/s/ R. SWEET
*U.S.D.J.*

**Opinion of the Second Circuit Court of Appeals in *General Marine Transport Corporation v. NLRB***

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 1186, 1304, Dockets 79-4035, 79-4074

Argued June 13, 1979

Decided March 26, 1980

GENERAL MARINE TRANSPORT CORPORATION,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

United Marine Division Local 333 I.L.A., A.F.L.-C.I.O.,

*Intervenor.*

Before

MANSFIELD and MULLIGAN, *Circuit Judges,*
and GAGLIARDI, *District Judge.**

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* The Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York, sitting by designation.

GAGLIARDI, *District Judge:*

General Marine Transport Corp. ("General Marine") petitions this court pursuant to Section 10(f) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 160(f), to review and set aside an order of the National Labor Relations Board entered on September 29, 1978 which adopted the recommendation of Administrative Law Judge David S. Davidson. The Board ruled that General Marine had engaged in unfair labor practices by repudiating a multi-employer association contract and by making unilateral changes in wages, hours and other terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act, 28 U.S.C. § 158(a)(5) and (1). The Board cross-petitions for enforcement of its order. Because we find that the complaint from which this enforcement proceeding arises is time-barred by virtue of section 10(b) of the Act, 29 U.S.C. § 160(b), the petition for review is granted, the order set aside, and the cross-application for enforcement denied.

*Statement of Facts*

A somewhat detailed review of the dispute between General Marine and the intervenor in this proceeding, United Marine Division Local 333 I.L.A., A.F.L.-C.I.O. ("Local 333"), is necessary for an understanding of the issues, particularly the statute of limitations issue, raised in this case. General Marine, a wholly-owned subsidiary of a holding company owned and operated by the Berman Family, operates sludge vessels used to transport and dispose of sewage sludge. Sometime prior to 1973, General Marine recognized Local 333 as the collective bargaining representative of its employees and joined the New York Marine Towing and Transportation Association ("the Association"), a multiemployer association which negotiates contracts on behalf of its members with the union. In 1969, General Marine agreed that all Association contracts listing it as a member would apply to employees working five vessels—the Susan Frank, the Sam Berman, the Samantha, the Richard K, and the Jonathan B (hereinafter "the 1969 letter of under-

standing"). On April 1, 1973, the Association, on behalf of owners of towing and transportation vessels, including General Marine, entered into a three year contract with Local 333. Article I Section I of the agreement limited its scope "to licensed and unlicensed employees, employed on tugboats and self-propelled lighters owned or operated by the [covered employers] in the Port of New York and vicinity."

Shortly before the expiration of the 1973-76 contract, the Association requested General Marine to complete an authorization form so that the Association could negotiate a new contract on its behalf. The president of General Marine signed the form and, in response to a request for the "number and type of vessels that your company . . . now owns or operates which are subject to the union agreements," the president listed one vessel—the Susan Frank. On March 26, 1976, the Association and Local 333 executed a new three year contract which, with the exception of two provisions, renewed the 1973-76 agreement. These two changes were as follows. First, the new agreement covered not only all employees working on vessels owned or operated by member employers, but also all employees of "a subsidiary company, an affiliated company or a company division in the Port of New York and vicinity." Second, the new agreement contained the so-called vegetable oil clause which stated that:

> [no] vessel operated under this contract shall tow any barge under 55,000 barrels used in the animal, vegetable, or fish oil trades unless there are two men aboard the barge at all times.

Based upon this agreement, Local 333 claimed that Berman Enterprises, Inc. ("Berman"), a corporation which operates tugs, barges, and tankers in the New York harbor and which, like General Marine, is a wholly-owned subsidiary of the Berman famiiy holding company, was required to abide by the contract between the Association and the union. On April 13, 1976, Peter Frank, Vice President of General Marine, sent a letter to Local 333 which stated, in pertinent part:

> We have studied [the agreement] and find that its scope exceeds the authority of the Association to negotiate on behalf of General Marine Transport Corp. In addition, the Memorandum, among other things agrees to conduct that constitutes an unlawful group boycott.
>
> As a result of these provisions this company cannot bind itself to the memorandum of Agreement and will not execute a collective bargaining agreement based upon its term.[1]

Between April and August 1976, Local 333 filed four separate charges with the Board, claiming that both General Marine and Berman had engaged in unfair labor practices. The first charge (Case No. 2-CA-14240), filed on April 23, 1976, stated that Berman and its affiliated companies, including General Marine, abrogated the 1976-79 Association contract by sending the April 13th letter to Local 333, thereby indicating a refusal to bargain fairly with the employee representative in the appropriate bargaining unit. The Regional Director refused to issue a complaint in this matter. In a letter dated June 16, 1976, she explained to the union the reasons for her decision:

> The investigation discloses that for many years past the only company named in the charge which had been a party to the aforesaid Association agreements was General Marine . . . It appears further from the evidence, that your recent efforts to secure a new contract from General Marine, included a demand that the unit of employees historically represented by you, as noted above, be enlarged to encompass employees and vessels of the various affiliated companies, which employees could not, at this time, appropriately be included in the historical unit . . . Under these circumstances, the refusal by

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1 General Marine sent a virtually identical letter to the Association on the same date. The only differene between the two letters is that the letter to the Association qualified its objection to the scope of the contract by stating that the agreement contains provisions that "further the interests of other members of the Association at the expense of General Marine Transport Corp."

> any of the charged parties to execute the Association agreement cannot be deemed to constitute a violation of the Act as alleged by you.

The Regional Director also supported her decision based upon the determination that the vegetable oil clause was an illegal hot cargo clause and called for a group boycott:

> Moreover, this agreement contains a provision which the General Counsel has concluded is in violation of Section 8(e) of the Act and is the subject of further proceedings in Case No. 2-CE-93.

The General Counsel of the Board denied Local 333's appeal in July 1976 and its request for reconsideration in August 1976 "substantially for the reasons set forth in the Regional Director's letter . . ."

Local 333 filed a second charge (Case No. 2-CA-14246) on May 18, 1976, stating that General Marine and Berman had refused to bargain, had induced employees to become members of another union, District No. 1—Pacific Coast District, Marine Engineers Beneficial Association, A.F.L.-C.I.O. ("MEBA"), and had conspired with MEBA to achieve this end. On June 30, 1976, two days after the Regional Director had determined that a complaint should issue alleging unlawful employer assistance,[2] Berman entered into a settlement agreement with the Board in which Berman agreed, *inter alia,* not to recognize MEBA as its employees' bargaining representative until the Board held an election following a representation proceeding that Berman had commenced on June 11, 1976.

Local 333 filed yet another set of charges on August 6, 1976, once again naming Berman and all its affiliates. The charge in Case No. 2-CA-14433-1 stated that the employers abrogated the 1976-79 Association contract by the April 13th letter and thereafter refused to bargain with the union with respect to the

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2 The Regional Director refused, however, to issue a complaint with respect to the portion of the charge alleging a refusal to bargain for "substantially the same . . . reasons" as stated in her dismissal letter of June 16, 1976 regarding Case No. 2-CA-14240.

employees working on four vessels—the Rebecca K, Susan Frank, Sam Berman, and Richard K.

The charge in Case No. 2-CA-14433-2 set forth identical claims except that they were directed only to employees of three ships replacing vessels listed in the 1969 letter agreement. On August 12, 1976, Berman requested dismissal of these charges on the grounds that they were identical to the previously dismissed charges raised in Case No. 2-CA-14240 and because the settlement agreement in Case No. 2-CA-14246 effectively precluded Berman from entering into an agreement with any union until the representation questions was resolved by the Board. Before the Board could act on Berman's request, Local 333 contacted the Regional Director and offered to withdraw the charges. On August 23rd, the Regional Director approved this request.

Having been unsuccessful with its unfair labor practice charges, the president of Local 333 wrote to Jared Stamell, general counsel for the Berman-owned enterprises, on August 18, 1976 stating that "demand is hereby made upon you to collectively bargain concerning the terms and conditions of our labor contract involving the vessels . . . acknowledged to be within the bargaining unit by the 1969 letter [agreement]. Stamell responded to the union's counsel on August 30th in pertinent part as follows:

> Dear Mr. Altier:
>
> I have received Local 333, United Marine Division's letters to Berman Enterprises Inc. and other corporations demanding collective bargaining.
>
> I am reviewing the demand on behalf of the corporations in light of the recent activities before the National Labor Relations Board, and the companies will respond directly to the union concerning the demand shortly.

On October 26, 1976, Berman's controller, Susan Frank, wrote to Local 333, advising the union that Berman believed that its August 18th demand was inappropriate because the representation issue was still pending and because the settlement agree-

ment in Case No. 2-CA-14246 precluded Berman from recognizing or bargaining with any union until a board election had been held.

Hearings were held in the representation proceeding during September and October 1976 and the Regional Director issued her decision on December 10, 1976. The Regional Director first reviewed the history of the coverage of Association contracts and found that only three of the vessels that were named in the 1969 letter of understanding were still owned by either Berman or General Marine.[3] She further found that the 1973-76 Association contract had been applied only to the crews of the two ships either owned or operated by General Marine, the Susan Frank and the Rebecca K,[4] and not any Berman vessels. The Regional Director concluded that the 1976-79 Association contract applied to the employees aboard these two vessels because General Marine had not withdrawn in a timely manner from the Association and thus that the contract was a bar to the election petition insofar as the petition purported to include these employees. The Regional Director rejected Local 333's contention that the 1976-79 Association contract was also binding on Berman and therefore was a bar to an election among Berman employees. Berman, the Regional Director noted, neither executed any document authorizing the Association to act on its behalf nor evidenced its desire to be a part of the multi-employer association by applying the terms of the contract to its employees. Accordingly, the Regional Director ordered that an election be conducted in a unit consisting of "the employees employed by Berman to man the various vessels it operates . . . and [not including] the employees manning the two sludge vessels operated by General Marine . . . "

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3 These three vessels were the Susan Frank, owned by General Marine, and the Sam Berman and the Richard K, sold by General Marine to Berman in 1971 and 1973 respectively.

4 General Marine began operating the Rebecca K after it submitted the authorization form in March 1976 to the Association.

Local 333 alone filed a request for review of the Regional Director's decision and direction of election. The Board denied the request on January 10, 1977. Shortly thereafter, the election was held, and on January 20, 1977, the Regional Director certified MEBA as the representative of employees on the vessels of Berman and its affiliates other than the Susan Frank and the Rebecca K.

Between January and March 1977, Local 333, with the representation question settled, demanded that General Marine honor the terms of the Association contract. In a letter dated January 19, 1977, Local 333 wrote:

> You have withheld pension insurance payments for these employees since last April during pendency of the Labor Board case. We herewith demand that said payments be reinstituted, including all arrears with interest from their due date.

Local 333 reiterated this request by letter dated February 11, 1977. A union official also telephoned General Marine's vice president, Peter Frank, on three occasions during this period. In each case, he was told that Frank was unavailable and spoke with the general counsel for Berman-owned enterprises. The union official again explained that General Marine owed pension and welfare payments to the union and insisted that it abide by the terms of the Association contract with Local 333.

On February 28, 1977, Local 333 filed a final unfair labor practice charge (Case No. 2-CA-14735) and the charge from which this enforcement proceeding arises. Unlike the previous four charges, this charge only named General Marine. On June 16, 1977, exactly one year after her dismissal of the first charge, the Regional Director determined that a complaint *should* issue, alleging that General Marine refused to bargain with Local 333 and violated Section 8(a)(5) and (1) by not abiding by the wage rates and pension and welfare contributions as set forth in the 1976-79 Association contract.

Administrative Law Judge David S. Davidson held a hearing on this matter in February 1978 and issued his decision on June 27, 1978. The ALJ determined that General Marine was

foreclosed, pursuant to section 102.67(f) of the Board's Rules and Regulations,[5] from further litigating the issue of the validity of the Association contract since that issue either was or could have been raised in the representation proceeding in which the Regional Director confronted the issue of whether or not the Association contract was a bar to an election among General Marine employees. The ALJ also determined, notwithstanding General Marine's initial repudiation of the Association contract by its letter of April 13, 1976, that the instant complaint was not time-barred by virtue of the six month limitation period set forth in section 10(b) of the NLRA. The ALJ offered two reasons for this conclusion. First, the Regional Director's December 1976 ruling that the Association contract was a bar to an election among General Marine employees, according to the ALJ, altered the circumstances to such an extent that it completely vitiated General Marine's prior repudiation. The ALJ therefore reasoned that Local 333's letter and phone calls between January and March of 1977 constituted fresh demands with a narrower bargaining unit and that General Marine's subsequent refusals constituted new repudiations of both the Association contract and its obligation to bargain. Secondly, the ALJ advanced what may be characterized as an estoppel theory: "[h]aving pleaded pendency of the petition as a reason not to apply the contract previously [General Marine] cannot now be heard to argue that its failure to apply the agreement after the Regional Director's decision was merely a repetition of its earlier conduct and not an unfair labor practice within the 10(b) period." Because the parties stipulated that General Marine failed to comply with several provisions in the contract since September 1976, and

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5 Section 102.67(f) of the Board's Rules and Regulations provides:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor proceeding.

having already determined that the validity of the contract could not be relitigated and that the complaint was timely, the ALJ held that General Marine violated Section 8(a)(5) and (1) of the NLRA and recommended that General Marine be ordered to comply with the terms of the Association contract.

General Marine filed exceptions to the ALJ's recommendation and a motion to re-open the record. In addition, counsel for General Marine requested leave to withdraw. By letter dated September 21, 1978, the Associate Executive Secretary of the Board notified General Marine that the Board had granted the request of counsel to withdraw as well as an extension until October 16, 1978 for new counsel to submit additional argument on the pending motion. Eight days later, however, the Board, without notice to General Marine, summarily affirmed the decision and recommended order of the ALJ. General Marine's new counsel continued to pursue his motion for reconsideration and to reopen the record.[6] On January 29, 1979, an order executed under the direction of the Board by its Associate Executive Secretary denied both motions.

*Discussion*

In support of its petition to set aside the Board's order, General Marine argues that (1) the complaint is time-barred under section 10(b) of the NLRA because the union filed and served its charge more than six months after the occurrence of the unfair labor practice upon which the complaint is based, (2) the Board violated General Marine's statutory and constitutional rights by foreclosing it from litigating the validity of the Association contract in the unfair labor practice proceeding and (3) the denial of the motion to reopen the record and to

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6 General Marine moved for reconsideration on two grounds: (1) that the Regional Director's ruling in the representation proceeding that the contract was a bar to an election did not determine its validity and (2) that the ALJ's refusal to hear testimony concerning events occurring prior to September 1, 1976—the beginning of the section 10(b) period—was material error. The basis for the motion to reopen the record was to introduce evidence obtained in an antitrust action commenced by General Marine against Local 333, the Association, and certain members of the Association.

reconsider was improper since the Board itself did not decide the motion and because the reaons for the denial were not stated. Because we agree that the complaint is time-barred, we need not consider the remaining issues.

Local 333 filed the charge from which this enforcement proceeding arises on February 28, 1977 and served it on General Marine on March 2, 1977.[7] Thus, the resulting complaint is timely only if the underlying unfair labor practice occurred on or after September 1, 1976. General Marine maintains that the complaint is time-barred since the charge was not filed until almost eleven months after the occurrence of the unfair labor practice—General Marine's initial repudiation of the Association contract on April 13, 1976. This position rests in large part on the Supreme Court's decision in *Local Lodge 1424 International Association of Machinists v. NLRB*, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960). In *Local Lodge*, a union committed a violation of the NLRA by entering into a collective bargaining agreement containing a union security clause at a time when it did not represent a majority of the employees in the appropriate unit. Charges were filed with the Board ten to twelve months after the execution of the agreement. Conceding that a complaint predicated on the execution of the agreement was time-barred, the Board nevertheless argued that the parties' continued enforcement of the agreement was a separate and continuing unfair labor practice not barred by section 10(b). The Court disagreed, holding that continued enforcement of the contract was not an unfair labor practice without reference to the unlawful execution of the bargaining agreement which had occurred more than six months prior to the filing of the charge. Thus, this was not a situation in which events ante-dating the six month period were being used solely to "shed light"

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7 At the hearing before the ALJ, the petitioner was unable to offer the return receipt of the mailing of the charge and thus establish conclusively the date upon which it mailed the charge to Local 333. The ALJ found, however, that other proof offered by General Marine "was sufficient to support an inference that a copy of the charge was mailed on March 2 and thereafter received."

on the events occurring within the limitations period. Instead, the case involved, according to the Court, an unfair labor practice that was "inescapably grounded" on a time-barred event. *Id.* at 422, 80 S.Ct. at 829.

The continuing violation theory that was rejected in *Local Lodge* fares no better when the alleged unfair labor practice is an agreement's continued *repudiation* rather than its continued *enforcement*. In the instant case, the complaint alleges that General marine engaged in unfair labor practices by continuing to repudiate the Association contract and unilaterally changing existing wage rates, hours of employment, pension and welfare contributions, and other terms and conditions of employment. *See* Joint Appendix at 5 ¶¶ 7-9. Just as the *Local Lodge* complaint was based upon the time-barred execution of a bargaining agreement, the complaint at issue here unequivocally derives from the time-barred initial repudiation of the Association contract. Other circuits have agreed that an employer's repeated repudiations of a multi-employer association contract constitute neither an unfair labor practice nor give rise to a cause of action with a separate limitation period. *See NLRB v. Serv-All Co. Inc.*, 491 F.2d 1273, 1275 (10th Cir. 1974); *NLRB v. McCready and Sons, Inc.*, 482 F.2d 872, 874-876 (6th Cir. 1973); *NLRB v. Field and Sons, Inc.*, 462 F.2d 748, 750 (1st Cir. 1972); *contra NLRB v. Strong*, 386 F.2d 929, 931 (9th Cir.), *cert. denied* 390 U.S. 920, 88 S. Ct. 853, 19 L. Ed.2d 980 (1968).

We recognize, as did the ALJ, that an employer's conduct or intervening circumstances can alter the grounds upon which the initial repudiation is based to such an extent as to make subsequent repudiations fundamentally separate unfair labor practices with their own limitation periods. *See NLRB v. McCready and Sons, Inc.*, *supra* at 875 n.3. We conclude, however, that neither General Marine's actions nor events occurring after its April 13, 1976 repudiation changed the circumstances to so great an extent. General Marine initially refused to execute the Association contract on at least two grounds: (1) that the Association exceeded the scope of its authority by entering into a contract which bound not only

General Marine but also its "affiliates", i.e. Berman, and (2) that the vegetable oil clause constituted an unlawful group boycott. The Regional Director's December 1976 ruling undisputedly resolved the question of the scope of the contract and, in so doing, eliminated it as a possible basis for General Marine's continued repudiations. However, it could not have resolved the hot cargo clause issue since "[i]t is well settled that contentions of this nature are not litigable in a representation proceeding." *Buckeye Village Market, Inc.*, 175 NLRB 271,272 (1969), *citing, inter alia, Food Haulers, Inc.*, 136 NLRB 394, 396 n.6 (1962). *See also Kroger Co.*, 165 NLRB 872, 881 (1967) ("[t]he limited scope of a representation case and the basic focus of such a case is illustrated by the fact that a contract containing a 'hot cargo' clause, unlawful under Section 8(e) of the Act has nevertheless been held to be a bar [to an election]"), *citing Food Haulers, Inc., supra.*[8] Indeed, the Re-

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8 At oral argument, the Board and Local 333 contended that *Food Haulers* does not stand for as broad a proposition as the Board cited it for in its brief: that "the existence of a boycott provision unlawful under Section 8(e) of the Act is not a matter which is relevant to or contemplated by a contract bar determination" (Respondent's Brief at 18-19). Instead, they argue that the validity of a group boycott clause would be litigable in a representation proceeding only if the provision, unlike the one included in the 1976-79 Association contract, appeared to be "so basic to the whole scheme of [the] contract and so interwoven with all its terms that it must stand or fall as an entirety." *See NLRB v. Rockaway News Supply Co.* 345 U.S. 71, 78, 73 S.Ct. 519, 523, 97 L.Ed. 832 (1953). Although this position illustrates that General Marine may not have been able to defend against refusal to bargain charges based upon the inclusion of the hot cargo clause in the repudiated contract, *see* dissenting opinion at p. 192, it concedes that the validity of the clause could not have been litigated before the Regional Director.

Local 333 also argues that *Food Haulers* and the other cases relied on by the petitioner only hold that a Regional Director's *rejection* of a contract bar defense in a representation hearing does not amount to a finding of contract validity for all other purposes. These cases do not establish, according to the union, that a Regional Director's finding of a contract bar does also determine the validity of the contract. We disagree. In *Food Haulers*, the Board held that a contract containing a hot cargo clause barred an election. In reaching this result, the Board noted that "it has consistently refused to

gional Director's thorough decision, ostensibly in conformity with these precedents, made no findings with respect to the validity of the contract or any clause therein.[9] After a review of the historical coverage of Association contracts, the Regional Director held only that "the 1976-79 Association contract is a bar to the petition insofar as the petition purports to include vessels owned or operated by General Marine including the Susan Frank and the Rebecca K." Thus, when General Marine continued to repudiate the Association contract throughout January and February 1977, one of its two unambiguous and independent reasons for the initial repudiation had not been altered by any intervening Board action. Accordingly, the company's continued repudiations were only a repetition of its earlier conduct rather than a separate unfair labor practice.

The ALJ determined, however, that General Marine was estopped from making this argument since it had relied on the pendency of the representation petition to deflect the union's demands. This is a misstatement of the facts because it was Berman, not General Marine, which followed this course of conduct. On June 30, 1976, two days after the Regional Director determined that a complaint should issue against Berman and its affiliated companies in Case No. 2-CA-14246, only Berman entered into a settlement agreement in which it agreed not to recognize any labor organiztion until the conclusion of the representation proceeding and a Board certified

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permit litigation of unfair labor practice issues in representation proceedings. The exception was made in the case of unlawful security cases [*C. Hager & Sons Hinge Manufacturing Co.*, 80 NLRB 163 (1948)], as pointed out above, because such clauses—unlike the clause here in issue—impinge directly upon an employee's free choice of bargaining representative, which a representation proceeding is designed to ascertain." *Food Haulers, Inc., supra*, at 396 n.6.

9 The union's statement that "extensive evidence was also adduced at the representation hearing concerning . . . the incidents leading to the alledged hot cargo clause dealing with towing vegetable oil clause" (Intervenor's Brief at 21-22) is not to the contrary. Our examination of the pages cited by the union for the above-quoted assertion indicates that the issue of the legality of the vegetable oil clause was hardly raised, let alone fully litigated.

election. The General Counsel eliminated any doubt that could exist with respect to this point by noting at the hearing before the ALJ that "the only signatory to the settlement agreement is Berman Enterprises and according to the [Regional Director's decision in the representation proceeding], Berman is something distinct from General Marine."

In August 1976, Local 333 wrote to Jared Stamell, general counsel for the Berman-owned enterprises, again to request compliance with the terms of the collective bargaining agreement. Although Stamell stated that he was "reviewing the demand on behalf of the *corporations*," he concluded by saying that "*the companies will respond directly to the union concerning the demand shortly* (emphasis added)." Berman did so on October 26, 1976. Susan Frank, the company's controller wrote:

> As you know, a petition for an election . . . is pending before the National Labor Relations Board. Furthermore, *this company* is precluded by the settlement agreement in the charge brought by . . . Local 333, from recognizing and bargaining with any union until after an NLRB election has been held.
>
> Under these circumstances, we believe that your demand is inappropriate and we ask that you withdraw it.
>
> Very truly yours,
>
> BERMAN ENTERPRISES, INC.

(emphasis added). Nothing in this letter indicates that Berman was speaking both for itself and on behalf of General Marine. In fact, the clear wording of the letter is to the contrary. Moreover, we are particularly wary to read this statement as an expression of General Marine's view since the gravamen of the tortured proceedings between the employers and Local 333 revolved around the non-recognition of the separate representational status of the employees working on Berman vessels. Finally, even assuming for the sake of argument that these letters could be considered somewhat equivocal, neither rises to the level of the kind of affirmative misrepresentations tradi-

tionally deemed essential for a party to be estopped from asserting a statute of limitations defense. *See, e. g.* Note, Developments in the Law—Statute of Limitations, 63 *Harv.L.Rev.* 1178, 1220-21 & n.354 (1950).

In short, we find that local 333 could have filed the instant charge any time after April 13, 1976, *see Nazareth Regional High School v. NLRB*, 549 F.2d 873, 882 (2d Cir. 1977); *Local 1104, Communication Workers v. NLRB*, 520 F.2d 411, 416 (2d Cir. 1975), *cert. denied* 423 U.S. 1051, 96 S.Ct. 778, 46 L.Ed.2d 639 (1976) and that nothing relieves it from its failure to do so within six months from that date. The intervenor argues that it was understandably unsure of the vessels covered by the Association contract and the companies to which it should have addressed its demand. This uncertainty may explain its reason for deciding to make a demand in a unit consisting of Berman and all its affiliated companies in the first charge filed ten days after the initial repudiation. However, it clearly does not explain why the union persisted in making demands in a broadened unit after the Regional Director twice refused, as early as June 1976, to issue complaints related to the repudiation of the contract on the ground that affiliated companies simply "could not . . . appropriately be included in the historical unit . . ." Based upon this clear direction, we do not believe that this case presents a situation, as the dissent suggests, in which the union was compelled to file separate and admittedly wasteful charges "covering every possible combination of employees it claim[ed] to represent" in order to be assured that it filed a timely charge in the appropriate bargaining unit as later determined at the representation hearing.

Accordingly, the petition for review is granted, the order set aside, and the cross-application for enforcement denied.

MANSFIELD, Circuit Judge (dissenting):

The majority, by holding that the unfair labor practice charge filed by Local 333 in February, 1977, was time-barred by § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), unfortunately reaches an unjust result. It does this by drawing unwarranted formalistic differentiations between closely affiliated members of the "Berman Family"—General Marine Transport Corp. (General Marine) and Berman Enterprises Inc. (Berman)—rather than by looking to the substance of their status as subsidiaries of one Berman holding company which constitutes one family enterprise engaged in operating sludge vessels. It disregards the fact that Local 333's earlier unfair labor complaint against General Marine, admittedly timely, could not be resolved until the Regional Director identified the vessels represented by Local 333 as distinguished from those represented by the Marine Engineers Beneficial Association (MEBA), which did not finally occur until December 10, 1976, when the representation proceedings instituted by the Berman Family were concluded. Lastly, it gives no effect to the fact that when Local 333 withdrew its timely-filed complaint in August 1976 after Berman moved to dismiss because of the pending representation proceedings, Local 333 was induced to refrain from further action pending those proceedings by Berman representations that the "corporations" (including General Marine) were considering the Union's demands but were "precluded" from bargaining until conclusion of the pending Board proceeding that would resolve which vessels were represented by Local 333 and which by MEBA.

Under the circumstances, fairness dictates (1) that General Marine be estopped from asserting a statute of limitations defense, and (2) that its refusal to bargain upon conclusion of the representation proceedings be held to constitute a new unfair labor practice. For these reasons I would enforce the Board's order with respect to the two vessels operated by General Marine.

The facts are simple and straight-forward. In March, 1976, Local 333 reached a collective bargaining agreement with the

New York Marine Towing and Transportation Association (the Association). On April 13, 1976, General Marine, a member to the Association, made known its objections to the agreement in a letter to Local 333, complaining primarily on the ground that it purported to bind the parent and affiliates of General Marine (i. e., Berman Enterprises), for whom the Association was not authorized to bargain.

On April 23, 1976, Local 333 filed charges with the Board claiming that General Marine and its affiliates in the Berman Family had, by the April 13 letter, refused to bargain in violation of the National Labor Relations Act. On May 18, the Union filed a second complaint, charging that General Marine and Berman had induced employees to join a different union, the Marine Engineers Beneficial Association (MEBA). On June 11, Berman commenced a proceeding to determine whether MEBA or Local 333 was the proper employee bargaining representative. On August 6, Local 333 filed another set of charges naming Berman and General Marine and alleging that they had refused to bargain with respect to employees working on several named vessels. Berman argued that these charges were duplicative of the charges already filed and that it was precluded by representation proceedings pending before the Board, to which it had agreed in settlement of the earlier charges, from entering into an agreement with any union until representation would be resolved. General Marine was inextricably involved in these proceedings, since it had claimed to have only one vessel, the Susan Frank, represented by Local 333, and that Local was claiming more vessels. (Eventually it was found to represent two vessels.) As a result, Local 333 withdrew its complaint.

On August 18, 1976, Local 333 sent a letter to Berman and all its affiliates, *including General Marine*. The letter was addressed to Jared Stamell, Esq., who represented both Berman and General Marine together as members of the Berman Family. The letter demanded collective bargaining with respect to employees working on two vessels run by General Marine, the Susan Frank and the Rebecca K, as well as two others which proved not to be in service. Stamell responded that he

was "reviewing the demand on behalf of the corporations" and added that "the companies will respond directly to the union concerning the demand shortly." In a letter dated October 26, 1976, Berman's controller Susan Frank (presumably the namesake of General Marine's ship Susan Frank) responded that the company was precluded from dealing with the demand by the pendency of representation proceedings before the NLRB. She did not specify whether she was speaking solely for Berman or for its subsidiaries as well.

On December 10, 1976, the Regional Director of the Board resolved the confusion as to which employees were represented by Local 333, determining that only those employed on the Susan Frank and the Rebecca K were so included. Each of these vessels had been named in Local 333's August 6 charges. In the three months following the NLRB determination, Local 333 demanded that General Marine adhere to the terms of the March 1976 agreement insofar as it applied to the two vessels. General Marine refused, and on February 28, 1977, Local 333 filed the unfair labor practice charge from which this proceeding arises.

General Marine now argues that the six-month statute of limitations of § 10(b) began running on April 13, 1976, the day it made known its initial refusal to comply with the contract, and that neither its conduct subsequent to that date nor intervening developments (especially the December 1976 Board determination) justify a conclusion that the statute of limitations is inapplicable. I cannot agree. In my view the conduct of General Marine and its representatives estops them from raising the statute of limitations defense and the December 1976 Board determination sufficiently changed the circumstances to render General Marine's subsequent refusal to comply with the agreement in its revised scope a new alleged unfair labor practice, restarting the limitations period.

General Marine's conduct should deprive it of the right to raise the statute of limitations defense because it put off Local 333's demands by relying on the pendency of the representation proceeding before the Board. The Administrative Law Judge and the NLRB so found, but the majority differs with them.

The April 1976 charges of Local 333 sought to compel General Marine to adhere to the collective bargaining agreement. General Marine was clearly put on notice of the union's demands. Yet because of the dispute over the extent to which General Marine's affiliates were bound, General Marine was able to avoid complying with the agreement even to the extent of those employees undisputedly within the bargaining unit. By the time the confusion as to the scope of the agreement was cleared up (in December 1976), more than six months had passed since General Marine's initial repudiation of the contract.

The majority argues that as early as June 1976 Local 333 should have known to make its demands solely with respect to the vessels ultimately found to be within the bargaining unit. The record clearly demonstrates that Local 333 attempted to do just that, but fell prey to the representations of General Marine. First, General Marine argued that the August 6 complaint (filed within the limitations period), which properly named the Susan Frank and the Rebecca K, was duplicative of the earlier charges, and Local 333 obligingly withdrew the charges, relying on the earlier charges. Second, the responses to the August 18 letter gave an unmistakable indication that General Marine sought to postpone consideration of the union's demands until the pending Board proceedings were resolved. In my view, each of these actions by General Marine suffices to estop it from advancing the statute of limitations defense.

The majority, parsing the nuances of the Frank letter, concludes that it was meant as the statement of only Berman, not General Marine. In effect, then, Berman is permitted to make Local 333 the unknowing and unwilling participant in a high-stakes shell game, forced to guess which letter conceals the representations of which member of the Berman Family. Since the underlying demand by Local 333 pertained to General Marine's vessels, the correspondence was with the counsel representing both General Marine and Berman, Berman was closely affiliated to General Marine as part of the Berman Family enterprise and the letter was so ambiguous that only the

most distrusting and sensitive reader would have suspected that only Berman itself was responding, General Marine should not be permitted to take advantage of the confusion it created.

Even if there were no such estoppel, I would conclude that the resolution of the dispute over which employees were covered by the contract changed the circumstances sufficiently to render General Marine's subsequent refusal to execute the agreement grounds for a new unfair labor practice charge. I recognize that absent a change of circumstances the statute of limitations begins running with the first refusal to execute an agreement, and not with subsequent refusals. See *NLRB v. Serv-All Co.*, 491 F.2d 1273, 1275 (10th Cir. 1974); *NLRB v. McCready and Sons, Inc.*, 482 F.2d 872, 874-76 (6th Cir. 1973). Cf. *Local Lodge 1424 v. NLRB*, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960). Here, however, there was such a change of circumstances.

The Board's determination in December 1976 definitively resolved the question of applicability of the contract to the Susan Frank and the Rebecca K. With the contract thus narrowed to eliminate the extension to all Berman vessels, Local 333 properly made a new demand for compliance with the contract as now revised by the Board. General Marine's refusal constituted a new alleged unfair labor practice because of this intervening change in circumstances. Cf. *NLRB v. McCready and Sons, Inc., supra,* 482 F.2d at 875-76 & n.3 (action barred after six months absent a change in position in the interim).

A contrary conclusion would compel a union, under such circumstances, to file separate sets of charges covering every possible combination of employees it claims to represent. Hearings on these charges would presumably be stayed until the Board determined which employees the union was actually entitled to represent. Once this determination was made, the union would be able to pursue whichever of its earlier-filed charges named the correct group of employees. This, it seems to me, is unnecessarily wasteful. Much more sensible is the course of events which actually occurred here. Local 333 made its charges with respect to all of the employees it claimed to

represent, the Board determined which of those employees the union did in fact represent, the Local 333 promptly made a demand as to only those employees. When the employer refused the demand, the union immediately filed its charges. The process is entirely consistent with the policies of the statute of limitations. It would not lead to litigation "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," H.R.Rep. 245, 80th Cong., 1st Sess. 40, quoted in *Local Lodge 1424 v. NLRB, supra,* 362 U.S. at 419, 80 S.Ct. at 828; see also *NLRB v. Auto Warehousers, Inc.,* 571 F.2d 860, 863 (5th Cir. 1978), because there was a full Board proceeding within six months of the time the charge was filed. Given the unchallenged good faith of Local 333, I would therefore conclude that the statute of limitations began running at the time of the Board determination in December 1976, and thus that this action was timely.

I find no merit in the other arguments raised by General Marine on appeal. The Administrative Law Judge acted properly when he precluded General Marine from relitigating the issue of which employees were covered by the agreement. See 29 C.F.R. § 102.67(f). "It is well established that the Board will not permit litigation at an unfair labor practice proceeding of matters which were, or could have been, litigated in the underlying representation proceeding." *NLRB v. Horn & Hardart Co.,* 439 F.2d 674, 683 (2d Cir. 1971). General Marine took no appeal from the representation proceeding and was therefore bound by its results.

The presence of the unlawful hot cargo clause in the agreement did not invalidate the entire agreement as to General Marine. See *Chattanooga Mailers Union v. Chattanooga News-Free Press Co.,* 524 F.2d 1305, 1313 (6th Cir. 1975). The clause was not "so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety." *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 78, 73 S.Ct. 519, 523, 97 L.Ed. 832 (1953). Indeed, the clause had no effect whatever on General Marine since its vessels did not tow vegetable oil barges.

Similarly, the presence of the "affiliated companies" clause did not relieve General Marine of its obligations, since that clause had been removed in the represenation proceeding.

Finally, I find no merit in General Marine's argument that the denial of its motions for reconsideration and to reopen the record before the Board (after the Administrative Law Judge's decision) was impermissible. It is clear that no new arguments or relevant evidence were being advanced. The motion was "denied as lacking in merit."

There was no improper delegation in having the order signed by the Associate Executive Secretary of the Board. Unlike the situation in *KFC National Management Corp. v. NLRB,* 497 F.2d 298 (2d Cir. 1974), *cert. denied,* 423 U.S. 1087, 96 S.Ct. 879, 47 L.Ed.2d 98 (1976), there was no evidence here that the motion was not considered by three members of the Board, as required; indeed, at oral argument we were advised that it was so considered.

I therefore conclude that the order of the Board should be affirmed and enforced, and must respectfully dissent.

**Decisions of National Labor Relations Board**

General Marine Transport Corporation *and* Local 333, United Marine Divison, I.L.A., AFL-CIO and Marine Towing and Transportation Employers' Association, Party to the Contract. Case 2-CA-14735

September 29, 1978

DECISION AND ORDER

By Members JENKINS, PENELLO, and MURPHY

On June 27, 1978, Administrative Law Judge David S. Davidson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and also filed a motion to reopen the record in this proceeding. General Counsel and the Charging Party filed answering briefs and statements in opposition to Respondent's motion.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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1 Due to a stenographic error, a portion of Respondent counsel's testimony reflected that a conversation which occurred in 1977 appeared in the transcript of the proceeding as the year "1976." We hereby correct this inadvertent error. Respondent's motion to reopen the record is hereby denied pursuant to Sec. 102.48(d)(1) of the Board's Rules and Regulations, Series 8, as amended, inasmuch as Respondent's motion and affidavit in support thereof do not state that there is any newly discovered evidence or evidence previously unavailable which Respondent seeks to adduce.

2 Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, General Marine Transport Corporation, Bayonne, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

## DECISION

### STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge: The charge in this case was filed on February 28, 1977,[1] and the complaint issued on June 16, 1977. The complaint alleges that Respondent[2] violated Section 8(a)(5) and (1) of the Act by repudiating an association contract and making unilateral changes in wages, hours, and other terms and conditions of employment. Respondent denies tht commission of any unfair labor practices.

A hearing was held before me in New York, New York on February 2 and 3, 1978. At the conclusion of the hearing the parties waived oral argument. Counsel for the General Counsel, the Charging Party, and Respondent have filed post-hearing briefs.

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overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

1 The date of service of the charge on Respondent is in dispute as set forth below.

2 Respondent's name appears in the caption as amended at the hearing.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

## Findings and Conclusions

### I. THE BUSINESS OF RESPONDENT

Respondent, a New Jersey corporation, maintains its office and place of business in Bayonne, New Jersey, from which it operates sludge vessels to transport sewage sludge for disposal at sea. Respondent annually performs services valued in excess of $50,000 for enterprises located outside New Jersey. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

Local 333, United Marine Division, I.L.A., AFL-CIO, referred to herein as Local 333, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Facts*

##### 1. The service of the charge

The complaint alleges that the charge was served on March 1, 1977. However, there is no affidavit of service and no return receipt in the formal papers to establish service of the charge on that date. Counsel for the General Counsel explained that in preparation for the hearing she was unable to find such documents and introduced in their place a post office registry manifold listing 13 articles of mail purportedly taken to and received by the post office for delivery by registered mail. The manifold is date-stamped March 2, 1977, and one of the entries on it for number 1893248 shows as the addressee General Marine Transport Corp., 19 Park Lane, Staten Island, N.Y., with additional notations "CA-14735 Reg. 22 Newark, N.J."[3]

3 It appears that at one point this case was transferred to Region 22 in Newark and then transferred back to Region 2 where it was ultimately processed.

Other entries on the form indicate that a number of pieces listed by the sender and recieved at the Post Office corresponded to the numbered entries listed on the manifold, and it purports to have been signed by an employee of the post office who received them.

Normal office procedure in the Board's Regional Office is to place charges in addressed envelopes and to list the addressees on a manifold such as that introduced in evidence. A separate affidavit of service for each item is also prepared. A docket clerk is responsible for collecting all return receipts as they are recieved, and it is normal procedure for the clerk to place check marks next to the appropriate entries on copies of the manifolds to indicate that the return receipts were received, stapled to the affidavits, and distributed to the persons in the Regional Office handling the cases. Such a check mark appears on the manifold in evidence next to the entry relating to the charge in this case.[4]

In it answer, Respondent stated that it lacked information sufficient to form a belief as to the truth of the allegation that the charge was served on March 1. At the hearing, counsel for Respondent stated that at the time he filed his answer he had been requested by the General Counsel to continue to try to find out whether or not Respondent had received the charge and that, as of the time of the hearing, he could firmly deny receipt of the charge as alleged in the complaint because he could find no one in the Company with any knowledge of receiving it. Respondent's vice president, Peter Frank, testified that he did not recall when he first became aware that the charge in this case had been filed or whether he had seen it before the hearing. Counsel for Respondent, however, conceded that he had cooperated in the investigation of the charge shortly after it was filed, stating that he was aware that there was a dispute "early" on and had talked to the Regional Office personnel.

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4 Regional Office practice was established by a statement of counsel for the General Counsel to which counsel for Respondent acquiesced.

While the date of initial service remained in dispute, the parties are in agreement that on May 24, 1977, a copy of the charge was properly served on Respondent.

2. The bargaining history

Beginning some time before 1973, the Marine Towing and Transportation Employers' Association entered into a series of contracts with Local 333 on behalf of listed employers, including Respondent, described as owners and operators of tugboats and self-propelled lighters. On April 1, 1973, the association entered into such an agreement effective until March 31, 1976, which listed Respondent among the owners and operators covered. Article I, section 1, provided that the agreement applied "only to licensed and unlicensed Employees, employed on tugboats and self-propelled lighters owned or operated by the Employers in the Port of New York and vicinity."

When that agreement was reopened for renegotiation in 1976 Respondent authorized the association to bargain collectively on its behalf. On March 26, 1976, the association and Local 333 entered into a new 3-year agreement continuing the old agreement, in effect, with certain specified amendments. One of the changes modified Article 1, section 1 to provide that the agreement applied "only to all licensed and unlicensed Employees, employed on tugboats and self-propelled lighters owned or operated by the Employers, a subsidiary company, an affiliated company or a company division in the Port of New York and vicinity."

When that agreement was reopened for renegotiation in 1976 Respondent authorized the association to bargain collectively on its behalf. On March 26, 1976, the association and Local 333 entered into a new 3-year agreement continuing the old agreement, in effect, with certain specified amendments. One of the changes modified Article 1, section 1 to provide that the agreement applied "only to all licensed and unlicensed Employees, employed on tugboats and self-propelled lighters owned or operated by the Employers, a subsidiary company, an affiliated company or a company division in the Port of New York and vicinity."

B. *Prior Charges and the Representation Proceeding*

On April 23, 1976, Local 333 filed a charge in Case 2-CA-14240 alleging that Berman Enterprises, Inc., referred to herein as Berman, had abrogated the new association bargaining agreement and was refusing to bargain with Local 333. The charge noted that companies affiliated with Berman included Respondent and seven other named corporations.

On May 18, 1976, Local 333 filed a charge in Case 2-CA-14246 alleging that Berman[5] had violated Sections 8(a)(1), (2), (3), and (5) by illegally assisting another union. MEBA, inducing and pressuring the members of Local 333 to become members of MEBA, and entering into an illegal contract purporting to bind Berman's employees at a time when Local 333 represented them and had a contract.

On June 11, 1976, Berman filed a petition in Case 2-RM-1774 seeking an election among all full-time and regular part-time tug, barge, and tanker employees employed by Berman on its various vessels, naming MEBA as a recognized bargaining agent since April 13, 1976, and Local 333 as a rival claimant.

On June 16, 1976, the Regional Director notified Local 333 that she was refusing to issue a complaint in Case 2-CA-14240. She stated that the evidence did not establish that Berman or its affiliates, including Respondent, unlawfully refused to bargain by failing to sign the association agreement since for many years only Respondent had been a party to association agreements, Local 333 represented only those employees on Respondent's payroll whose primary employment was limited to specific vessels enumerated in a 1969 letter of understanding, and Local 333's efforts to secure a new contract from Respondent included a demand that the unit of employees be enlarged to encompass employees of vessels of the various affiliates who could not at that time appropriately be included in the historical unit.[6] The Regional Director also noted or-

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5 This charge contained a similar notation as to Berman's affiliates.

6 A further reason stated in the letter was that the agreement contained a provision which the General Counsel had concluded violated Sec.

ganizing activity among the previously unrepresented employees by another labor organization.[7]

On June 28, 1976, the Regional Director notified Local 333 that she was refusing to issue a complaint with respect to the 8(a)(5) portion of the charge in Case 2-CA-14246 for the same reason that she had refused to issue the complaint in Case 2-CA-14240. On June 30, 1976, Berman entered into a settlement agreement with respect to the remainder of the charge in Case 2-CA-14246 in which Berman undertook not to recognize MEBA as representative of its employees until it had been certified, not to enforce or maintain in effect its agreement recognizing MEBA or any other agreement between Berman and MEBA until MEBA was certified, and not to assist or support MEBA or any other labor organization unlawfully. As part of the settlement Berman also undertook not to enter into or maintain or give effect to any agreement which required its employees to join or maintain membership in any labor organization as a condition of employment, unless it was the representative of such employees as provided in Section 9(a) of the Act and the agreement conformed to the reqirements of Section 8(a)(3) of the Act.

On August 6, 1976, Local 333 filed a new set of charges against Berman, noting again the names of its affiliates including Respondent. In case 2-CA-14433-1 Local 333 alleged that Berman abrogated the association contract by letter of April 13, 1976, and thereafter refused to bargain with Local 333 with respect to the employees of four named vessels, the Rebecca K, Susan Frank, Sam Berman, and Richard K which it identified as the vessels acknowledged by a 1969 letter to be within the

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8(e) of the Act and was the subject of further proceedings in another case. The record in this case does not indicate what became of those proceedings, but no contention has been made in this case based upon any alleged violation of Sec. 8(e) be any term of the association contract with the Union.

7 On July 23, the General Counsel notified Local 333 that its appeal from the Regional Director's refusal to issue a complaint in this case was denied for essentially the reasons stated by the Regional Director, and on August 20 the General Counsel notified Local 333 that a request for reconsideration had been denied.

bargaining unit. The second charge in 2-CA-14433-2 was identical except that its allegations were directed to the employees of the Pamela, Evelyn, and Jared S. which the charge described as replacement vessels for the Jonathan B. an Samantha which were no longer operational.

On August 12, 1976, Berman requested dismissal of these on the grounds that they were identical to the charge in Case 2-CA-14240 and because the settlement agreement in Case 2-CA-14246 effectively precluded Berman from entering into an agreement with any labor organization until the question concerning representation was resolved by a Board election. On August 23, 1977, the Regional Director approved Local 333's request for withdrawal of these charges.

On 7 days between September 28 and October 29, 1976, the hearing on the petition in Case 2-RM-1774 was held, and on December 10, 1976, the Regional Director issued her Decision and Direction of Election in that case.

In that proceeding Berman sought an election in a unit of all tug, barge, and tanker employees on the boats owned or operated by Berman, Respondent, and another affiliate which were the only companies among Berman's affiliates which have employees. Local 333 contended that the association agreement covered all these employees and barred any election. MEBA contended that at most the contract covered Respondent's employees, but not those of Berman or the other affiliate, while Berman contended that Local 333 had no binding agreement with Berman Enterprises or any of its affiliates.

In her decision the Regional Director found that Respondent operated the sludge vessels Susan Fran and Rebecca K. After reviewing the bargaining history between Local 333 and the association for Respondent, including the negotiation of the 1976 agreement, the Regional Director found that on April 13, 1976, Respondent acknowledged receipt of the new association agreement from Local 333 but protested the scope of coverage of the agreement which Respondent contended exceeded the authority it had given the Association to negotiate on its behalf. She found that Respondent informed Local 333 on April 13 that it would not bind itself to the terms of the new agreement or execute a contract on those terms.

The Regional Director reviewed the history of coverage of the Association contracts and found that of those vessels which were named in an initial letter in 1969 recognizing Local 333 as representative of employees of General Marine, only three remained in existence; that the 1973-76 association contract had been applied substantially to the crews on the sludge vessels Susan Frank, and the Rebecca K. who were members of Local 333; and that it had not been applied to the crews of the other vessels at issue.

The Regional Director concluded that because Respondent was a member of the association and did not withdraw from it at an appropriate time, the 1976-79 association agreement was a bar to the petition insofar as the petition purported to include the Susan Frank and the Rebecca K.[8] She found further, however, that Berman and its other affiliates had not agreed to be bound by the association agreement, that the association agreements had not been applied to any employees of the vessels operated by them, and that the contract was not a bar to an election in a unit of all tug, barge, and tanker employees employed on vessels operated by Berman and its affiliates other than the Susan Frank and Rebecca K.

Local 333 filed a request for review of the Regional Director's Decision and Direction of Election which the Board denied on January 10, 1977. Neither Berman nor MEBA filed a request for review. The election was held, and on January 20, 1977, the Regional Director certified MEBA as the representative of the employees on the vessels of Berman and its affiliates other than the Susan Frank and Rebecca K.

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8 At the hearing in the instant case Respondent contended that the agreement, if any, applicable to its employees was another agreement between Local 333 and the association covering employees on vessels of other descriptions than tugboats and self-propelled lighters. As it was not clear from the face of the Regional Director's decision which agreement she relied on, the representation case record was received in evidence for the limited purpose of resolving that ambiguity. It is clear from that record that the tugboat and self-propelled lighter agreement was the only agreement before the Regional Director and is the agreement which she found to be a bar.

3. Communications between Local 333 and Respondent

Apart from Respondent's April 13 letter to Local 333, referred to in the earlier charges and in the Regional Director's Decision and Direction of Election, the record shows other communications between Local 333 and Respondent from August 1976 through March 1977. On August 18, 1976, Local 333 addressed a letter to Berman and all its affiliates notifying them that Local 333 demanded that they bargain collectively "concerning the terms and conditions of our labor contract involving vessels Rebecca K, Susan Frank, Sam Berman and Richard K (which vessels are acknowledged to be within the bargaining unit by the 1969 letter)." On August 30, 1976, counsel for Berman and the affiliates wrote Local 333's attorney that the demand was being reviewed in the light of the recent activities before the Board and stated that the companies would respond to Local 333 shortly.

On September 16, 1976, Local 333 again addressed a letter to Berman and all its affiliates stating that Local 333 had learned that the companies had recently discontinued payment of time and one-half to Local 333 members for Saturday and Sunday work on board the Rebecca K and Susan Frank which it alleged constituted a breach of their collective-bargaining agreement.

On October 26, 1976, Berman replied to Local 333's August 18 letter stating that because the representation petition was then pending before the Board and because the Company was precluded by the settlement agreement in Case 2-CA-14246 from recognizing or bargaining with any union until after a Board election had been held, Berman believed that the Union's August 18 demand was inappropriate.

On January 19, 1977, Local 333 wrote Respondent:

> As you know, the U.S. Labor Board ruling effectively determined that this Union is the bargaining representative for the men employed on board your sludge vessels.
>
> You have withheld pension insurance payments for these employees since last April during pendency of the Labor Board case. We herewith demand that said pay-

ments be reinstituted, including all arrears with interest from their due date.

On February 11, 1977, Local 333's attorney wrote Berman and Respondent concerning delinquent pension plan contributions relating to the two companies stating:

> As I advised you in today's telephone conversation, this letter is to make formal demand on behalf of the United Marine Division, Local 333, ILA, AFL-CIO and the New York Marine Towing and Transportation Industry Pension Fund for delinquent pension plan contributions for non-union members of the bargaining unit as well as bargaining unit employees from 1970 to date.
>
> An immediate response from your clients is requested.

In addition, on three occasions in January, February, and March, 1977, Local 333 Secretary-Treasurer Cornette sought to reach Respondent's vice president, Peter Frank, by telephone. In each case he was told that Frank was not available and spoke with Respondent's counsel. In the first conversation Cornette told him that Respondent owed employees vacation pay, owed Local 333 pension and welfare payments, and was not paying overtime or prevailing wage rates. Cornette insisted that Respondent abide by the terms of their contract. Respondent's counsel replied that Respondent did not have a contract with Local 333.[9]

In early February and again in March, Cornette made essentially the same complaints, and Respondent's counsel again asserted that Respondent had no contract with Local 333.[10]

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9 Cornette was unsure of the exact time of this conversation. He placed it in the first week of January and around the time of the Regional Director's representation decision but was uncertain whether Local 333 was pursuing its appeal of that decision at the time.

10 I have credited Cornette's testimony as to these conversations. Respondent's counsel made an offer of proof that if he were called to testify he would testify that in January, February, and March 1976 he had no telephone conversations with Cornette. When it was pointed out that there

There is no dispute that in certain respects Respondent has not complied with the terms of the association contract. Thus, the parties stipulated that since September 1, 1976, Respondent has not made pension and insurance fund contributions required by the association contract, has not paid its employees at the hourly wage rates provided in the contract, and has not used the method of computation set forth in the contract in determining the wages for the sludge vessel employees.

## B. *Concluding Findings*

### 1. The 10(b) period

Section 10(b) of the Act provides "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

Section 102.111 of the Board's Rules and Regulations provides:

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was no objection to such testimony, he took the stand. Counsel for the Charging Party volunteered that he had no objection to testimony in narrative form if Respondent's counsel desired to testify in that fashion. However, Respondent's vice president, Frank, who is a member of the bar and was in the hearing room, asked to enter an appearance and conducted the examination. After two preliminary identifying questions and answers, the following question and answer comprised the remainder of the testimony:

> Q. Mr. Stamell, did you have any conversations with Mr. Cornette in January, February and March or April of 1976? About settlement of a case; settlement of a labor controversy?
>
> A. No, I did not.

This testimony fell short of the denial which Respondent's counsel proffered in his offer of proof. As the record stands the qualification added to the question asked limits the response to less than a denial of the conversations to which Cornette testified, and indeed both the offer and the testimony relate to a period a year before that covered by Cornette's testimony. Although there is some doubt whether the qualified nature of the denial and the dates were intentional or attributable to inadvertence and an inartfully phrased question, both Respondent's counsel and Frank impressed me as sufficiently adroit, alert, and articulate to have insured that the record contain a flat denial if that were intended. Accordingly, I regard Cornette's testimony as uncontradicted and find no reason within its borders to discredit him as to his conversations with Respondent's counsel.

> Charges may be served personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

Section 102.113(b) provides:

> The person or party serving the papers or process on other parties in conformance with sections 102.111 and 102.112 shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in Section 102.112 shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of service.

Here, there is no affidavit of service from any person who mailed the charge and no return receipt for the charge in March. Such proof of service under Section 102.111 would be conclusive, but its absence does not preclude the General Counsel from establishing by other means that the charge was in fact served at that time.

The statements of counsel as to Regional Office procedure, acquiesced to by Respondent's counsel, and the entries, including the check mark, on the registered mail manifold are sufficient to support an inference that a copy of the charge was mailed March 2 and thereafter received. That inference receives additional support from the fact that Respondent's counsel cooperated in the investigation of the charge shortly after it was filed. Against this inference is to be weighed the change in Respondent's answer at the hearing to deny receipt of the charge and counsel's statement in connection therewith

that he could find no one in the company who knew of receiving it.[11] I find that the statements of Respondent's counsel do not rebut the inference that the charge was served in March, and I conclude that the evidence relied upon by the General Counsel is sufficient to establish service of the charge on March 2, 1977. In any event, as it is conceded that a copy of the charge was mailed on May 24, 1977, unfair labor practices occurring after November 24; 1976, are clearly within the purview of the complaint.[12]

### 2. The effect of the Regional Director's Decision in Case 2-RM-1774

The General Counsel and Charging Party contend that in the absence of newly discovered or previously unavailable evidence, Respondent is bound by the findings of the Regional Director in Case 2-RM-1774 that a valid contract existed between Respondent and the Union covering the employees on the Susan Frank and the Richard X, and that Respondent may not relitigate in this proceeding issues which were or could have been litigated in the representation proceeding. Respondent contends that the finding of contract bar in the representation proceeding is not binding upon it because this proceeding is not a "related subsequent unfair labor practice proceeding" within the meaning of Section 102.67(f) of the Board's Rules and Regulations and because the issue of contract bar was a subsidiary question not related to determination of unit and eligible voters which had to be litigated even at the cost of delay of the representation election.[13]

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11 Peter Frank's testimony that to his knowledge he had not seen the charge before the day of the hearing adds little for a copy of the charge was admittedly served on Respondent in May 1976. No witness was called to testify as to Respondent's procedure with respect to receipt of registered mail or to deny that the charge was received.

12 Secs. 102.113(a) and 102.114(a) of the Board's Rules and Regulations.

13 No contention has been made that Respondent was not a party to the representation proceeding because it was brought in the name of Berman.

Section 102.67(f) of the Board's Rules and Regulations provides:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor proceeding.

It is clear that this rule bars relitigation of representation case issues in any proceeding based on a complaint alleging refusal to bargain with a certified union in which the employer challenges the validity of the certification.[14] Thus, if in the representation case Respondent had unsuccessfully urged the association contract as a bar to any election, it would not have been allowed to relitigate that issue in a later proceeding challenging a resultant certification. Here, because the contract was found to be a bar to an election among the employees on the sludge boats operated by Respondent, there is no certification to be tested; but Respondent's challenge to the contract is tantamount to a challenge to a certification since it challenges the foundation of the Local 333's claim to represent Respondent's employees. The issue of the existence of a contract binding on Respondent is identical to the issue raised and decided in the representaion case, and it is not the kind of issue which an employer might well forego litigating in the interest of obtaining a speedy election.[15] The issue of contract bar goes

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14 See *Sunshine—50 Care Centers, Inc., Hilton Convalescent Home Division* 220 NLRB 256 (1975).

15 See *Amalgamated Clothing Workers of America, AFL-CIO [Sagamore Shirt Co.] v. N.L.R.B.*, 365 F.2d 898, 905 (C.A.D.C., 1966). In its brief in this case Respondent asserts that in a statement in response to the Union's petition for review in the representation case, the employer stated that despite reservations about the Regional Director's finding that an election was barred among Respondent's employees, it nonetheless believed that an

directly to whether or not a question concerning representation exists, for if the contract is a bar there will be no election to avoid delaying by waiving review.

Accordingly, I find that this proceeding is related to the representation proceeding within the meaning of Section 102.67(f) of the Board's Rules and Regulations and that the issues relating to the Association contract which were raised or could have been raised in the representation proceeding may not be relitigated herein.[16]

3. The alleged refusal to bargain

The General Counsel contends that although Respondent initially repudiated the contract before September 2, 1976, 6 months before the charge was filed and served, there were further failures or refusals to apply the contract after that date which establish unfair labor practices within the 6-month period. Respondent contends that any repudiation or unilateral changes which occurred took place more than 6 months before the charge was served, even assuming that March 2, 1977, was the date of service, and that the allegations of complaint are therefore time-barred.

The Regional Director's decision in the representation case established that from April 1976, on there was a dispute

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election had been directed in an appropriate unit and that the result would settle and stabilize the employer's labor relations. The question is not Respondent's motivation in this case but whether the issue of the existence and validity of the contract was one which Respondent was likely to drop in the interest of an expeditious election. It should be noted that the assertion that Respondent's labor relations would be settled and stabilized by not pursuing the contract bar issue could hardly be accurate if Respondent did not intend to accept the Regional Director's contract bar finding.

16 Since determination of these issues in the representation proceeding is binding, contrary to Respondent's contention, there is no guarantee of a hearing before an Administrative Law Judge with respect to them. See *Janler Plastic Mold Corporation,* 191 NLRB 162 (1971). If, as Respondent contends, the Regional Director's decision is in error, the Board may correct that error on its own motion, but I must consider the Regional Director's decision as binding.

between the parties arising out of the amendment to the agreement which broadened its coverage. Earlier charges were dismissed because the Regional Director concluded that Respondent had no obligation to execute an agreement for an enlarged unit and because of the organizing activity among the previously unrepresented employees of Respondent's affiliates.

Although in August, still more than 6 months before March 2, Local 333 appeared to narrow the scope of the unit to which it sought to apply the association agreement, it continued to seek to enlarge its application beyond Respondent's two sludge boats.[17]

Following the Regional Director's decision in the representation case and the denial of the Union's request for review, Local 333 changed its request. On January 19, 1977, Cornette wrote Respondent, rather than Berman and/or its affiliates as in the past. Cornette referred to the Regional Director's decision that the Union was the representative of Respondent's sludge boat employees and sought pension insurance payments for these employees.[18] In January, February, and March, Cornette tried to contact Respondent's vice president to complain that the contract benefits were not being provided to Respondent's crew.[19]

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17 Local 333's September 16, 1976, letter, within the 10(b) period, charged Berman with violating contract premium pay provisions for work aboard the Rebecca K and Susan Frank. But it is not clear that this letter represented a change in the Union's position as to the scope of the application of the contract rather than a charge of violation in a portion of the unit then claimed by the Union. In view of the position taken by the Union in the representation proceeding, it appears that it had not narrowed its claim to the employees of these two vessels at that time.

18 A later letter dated February 11 is addressed to Respondent and Berman but is not clear to what bargaining unit it refers. No claim was made therein that the contract applied to vessels other than the Susan Frank and Rebecca K.

19 While Cornette's testimony is vague as to whether his first call preceded or followed denial of the Union's request for review in the representation proceeding, it is clear that it came after the Regional Director's decision.

I find that issuance of the Regional Director's decision that the contract was a bar to an election for Respondent's sludge vessels altered the circumstances to require, even in the absence of fresh demands, application of the contract to the sludge vessels, as the decision clarified Respondent's obligations and removed the pendency of the election as a reason not to apply the contract. Having pleaded pendency of the petition as a reason not to apply the contract previously, Respondent cannot now be heard to argue that its failure to apply the agreement after the Regional Director's decision was a mere repetition of its earlier conduct and not a separate unfair labor practice within the 10(b) period. In any event, the January 19 letter and Cornette's telephone calls were sufficient to constitute fresh demands within the narrower unit and to require responses to Respondent's intentions with respect to compliance with the agreement in the unit to which the Regional Director found that it applied. The lack of response to the January 19 letter and the negative responses to Cornette's telephone calls constituted new repudiations of the contract and of Respondent's bargaining obligation which differed from the earlier repudiations of the attempts to broaden the application of the association contract.[20] I find therefore that within the 10(b) period Respondent for the first time refused to apply the contract to Respondent's sludge vessels and denied the existence of any contract notwithstanding the contrary determination in the representation proceeding.[21]

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20 Respondent contends that the dismissal of the charge in Case 2-CA-14240 is not consistent with the representation case decision or issuance of the complaint in this case and prejudiced Respondent by denying Respondent the opportunity for an adjudication hearing on all issues which it would have had on a complaint based on the earlier charge. The issuance of the Regional Director's decision and the narrowing of the Local 333 demand are changed circumstances, however, which explain the difference in the disposition of the charges, and no inconsistency has been shown.

21 I note that this finding would be the same even if the date of service of the charge were found to be May 24, 1977. In support of Respondent's contention that the complaint is time-barred by Sec. 10(b), it relies on *N.L.R.B. v. Field and Sons, Inc.*, 462 F.2d 748 (C.A. 1, 1972); *N.L.R.B. v.*

As there is no question that Respondent has repudiated application of the association agreement to its sludge vessels, as a valid contract covering these employees exists, and as the complaint is not time-barred, it follows that Respondent has violated Section 8(a)(5) and (1) by its repudiation of the agreement.[22]

## THE REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent violated its obligation under the Act by repudiating the tugboat and self-propelled lighters agreement between the Union and the Association effective April 1, 1976, I shall also recommend that Respondent be ordered upon request to comply with its terms retroactively to September 2, 1976,[23] and to make whole the

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*McCready & Sons, Inc., and Melio Construction, Inc.*, 482 F.2d 872 (C.A. 6, 1973); *N.L.R.B. v. Serv-All Co., Inc.*, 491 F.2d 1273 (C.A. 10, 1974); and *N.L.R.B. v. Lundy Manufacturing Corp.*, 286 F.2d 424 (C.A. 2, 1960), while conceding that *N.L.R.B. v. Joseph T. Strong d/b/a Strong Roofing and Insulating Co.*, 386 F.2d 929 (C.A. 9, 1967) is to the contrary. The cases relied upon by Respondent are distinguishable on their facts, for in none of them were there changed circumstances within the 10(b) period similar to those in this case. See *N.L.R.B. v. Sweet Lumber Company*, 515 F.2d 785 (C.A.10, (1975)) cert. denied 423 U.S. 985 (1975); *City Roofing Co.*, 222 NLRB 786 (1976). In any event, the Board has not indicated that it has abandoned the position taken by it in these cases.

22 The complaint also alleges that since April 1, 1976, Respondent unilaterally changed terms and conditions of employment without notifying the Union or giving it an opportunity to bargain. It alleges further that as this conduct continued since September 1, 1976, it therefore an unlawful refusal to bargain. I find it unnecessary to decide whether these changes independently violated the Act, for all the changes related to terms and conditions covered by the agreement and the remedy would be the same whether or not the additional finding is made.

23 Whatever disputes existed as to the coverage of the agreement and the representation of Respondent's employees, the contract was effective

employees for losses, if any, which they may have suffered by Respondent's refusal to honor such an agreement in accordance with the formulae set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB 651 (1977).[24]

## CONCLUSIONS OF LAW

1. General Marine Transport Corporation is an employer engaged in commerce within the meaning of Section 2(2) and (6) and (7) of the Act.

2. Local 333, United Marine Division, I.L.A., AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All licensed and unlicensed employees aboard the association's employer-members' tugboats and self-propelled lighters operating in the port of New York and vicinity constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since April 1, 1976, the Union has been and now is the exclusive representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing on or about January 19, 1977, and thereafter to honor the collective-bargaining agreement effective April 1, 1976, between the Union and the association covering the employees in the appropriate unit. Respondent has engaged in unfair labor practices affecting commerce

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April 1, 1976. In withholding its application to the employees of Respondent's sludge vessels, Respondent acted subject to any later determination as to its obligation and the question concerning representation. Respondent's contract obligation did not arise when those determinations were made, but with the contract's effective date. However, Sec. 10(b) limits retroactivity of the make-whole order in such circumstances to the 10(b) period. *Nelson-Hershfield Electronics,* 188 NLRB 26 (1971); *Ellis Tacke d/b/a Ellis Tacke Company,* 229 NLRB 1296 (1977).

24 See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[25]

The Respondent, General Marine Transport Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to honor the collective-bargaining agreement effective April 1, 1976, between Marine Towing and Transportation Employer's Association and Local 333, United Marine Division, ILA, AFL-CIO, applicable to the employees in the appropriate unit described in paragraph 3 in the section of this Decision entitled "Conclusions of Law" above, or otherwise refusing upon request to bargain collectively with said Union as the exclusive representative of said employees with respect to rates of pay, wages, hours of work, and other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Give effect retroactive to September 2, 1976, to the terms and conditions of the agreement described in para-

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25 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

gaph 1(a), and make its employees whole for losses, if any, they may have suffered as a result of its refusal to honor such agreement in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amounts of backpay, if any, due under the terms of this recommended Order.

(c) Post at its Bayonne, New Jersey, place of business, copies of the attached notice marked "Appendix."[26] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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26 In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

# APPENDIX

## NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT fail or refuse to honor the contract effective April 1, 1976, between Marine Towing and Transportation Employer's Association and Local 333, United Marine Division, I.L.A., AFL-CIO, applicable to the employees on our sludge vessels who come within the appropriate unit described below.

WE WILL give effect retroactive to September 2, 1976, to its term and conditions and make our employees whole for losses, if any, which they may have suffered as a result of our refusal to honor the contract on and after that date.

WE WILL NOT refuse to bargain collectively with the aforementioned Union for the unit described herein with respect to rates of pay, wages, hours of work, and other terms and conditions of employment. The bargaining unit is:

> All licensed and unlicensed employees aboard the Association's employer-members' tugboats and self-propelled lighters operating in the port of New York and vicinity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in or to refrain from engaging in any or all the activities specified in Section 7 of the Act.

GENERAL MARINE TRANSPORT CORPORATION

**Decision of the NLRB in Berman Enterprises**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

Case No. 2-RM-1774

BERMAN ENTERPRISES, INC.
*Employer-Petitioner*[1]

and

DISTRICT NO. 1, PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO
*Union*

and

UNITED MARINE DIVISION, LOCAL 333, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
*Union*

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Howard S. Shapiro, a Hearing Officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding, it is found that:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

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1 The names of the parties appear as amended at the hearing.

2. The Employer, a New York corporation with its principal office and place of business at 1 Ingham Avenue, Bayonne, New Jersey, is engaged in the operation of tugs, barges and tankers which transport oil and other products in and out of the Port of New York. During the past year the Employer derived revenues in excess of $50,000 from customers located outside New York State. Based on the record and the stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.[2]

4. The Employer seeks an election in a unit of all its tug, barge and tanker employees. Local 333, the Intervenor herein, maintains that its association-wide contract covers these employees of the Employer and thus bars this petition. District No. 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO, herein referred to an MEBA, maintains that at most the contract covers only those employees employed by General Marine Transport Corp., hereafter referred to as General Marine, while the Employer appears to maintain that there is no binding contract with it or with General Marine.

The Berman family, Nathan and Morris Berman, Evelyn Berman Frank, and various of their children are the sole owners and operating officers of the many companies that comprise the enterprise.

At present, Standard Marine Services, Inc., set up in 1975, is the holding company of all the wholly owned subsidiaries including the following three operating companies: Berman Enterprises, Inc., herein sometimes called the Employer, operates tugs, barges and tankers, with each vessel constituting a

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2 United Marine Division, Local 333, International Longshoremen's Association, AFL-CIO, herein referred to as Local 333, was named in the petition and permitted to intervene based on a contractual relationship with the Employer.

separate corporation;[3] General Marine which owns and operates a sludge vessel, Susan Frank, and appears to operate another sludge vessel, Rebecca K; and Standard Tank Cleaning Corp., a corporation which performs tank cleaning on ships and barges.[4] These three wholly owned subsidiaries, Berman Enterprises, the Employer herein, General Marine and Standard Tank are the only corporations of the Berman complex that have employees.

To understand the contentions of the parties the bargaining and corporate history must be considered. In the 1950's the Bermans owned and operated Coastal Petroleum Transport[5] and General Marine. Local 333 attempted to organize employees of Coastal Petroleum but was unsuccessful. However, Local 333 was recognized as collective-bargaining agent for employees of General Marine, which corporation was a member of the New York Marine Towing and Transportation Association, herein the Association. In September 1969, General Marine and Local 333 confirmed by letters that the employees of General Marine on the vessels operated by it,

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3 The following is a list of the companies, the name of the vessel owned, and the type of vessel.

| | | |
|---|---|---|
| W.B. Enterprises | Lindsey Frank | Barge |
| Independent Bulk Transport | Jodie K | Barge |
| Watts Facilities | Amy B | Barge |
| Watts Ways Towing, Inc. | Sam Berman | Tanker |
| Crystal Oil Co., Inc. | Alan Martin | Tanker |
| Dominion Transportation Corp. | Jane Frank | Tanker |
| Sludge Tank Cleaning Corp. | Rebecca K | Sludge Boat |
| Barge Operations, Inc. | Pamela | Tug |
| Marine Towing, Inc. | Evelyn | Tug |
| Tug & Barge Operations, Inc. | Jared S | Tug |
| Diversified Transport Corp. | Sarah Frank | Barge |

Two tugs—Larry B and Richard K—appear in the record without corporate ownership, they may be owned by Berman itself.

4 The employees of this corporation are represented by another union and are not involved herein.

5 It is not clear from the record whether this corportion still exists.

namely, Susan Frank, Sam Berman, Samantha, Richard K and Jonathan B, were to be covered by the Association contract. Subsequent contracts bewteen Local 333 and the Association, have included General Marine as a member. The 1973-1976 contract between the parties terminated on March 31, 1976. On January 14, 1976, the Association, by letter, informed its members including General Marine that a bargaining commitee for the coming negotiations was to be set up and requested authorization from each member to bargain on its behalf and enclosed a form for confirmation of authority. In addition to the signature required on the confirmation, there was a request for "The number and types of vessels that your Company (or Companies) now owns or operates which are subject to the Union agreements." Evelyn B. Frank, president, signed and returned the confirmation for General Marine, and listed one self-propelled tank vessel as owned or operated. On March 26, 1976 a Memorandum of Agreement was executed by the Association and Local 333, containing changes in the terms and conditions of the prior contract. On April 13, 1976 letters were sent by Peter M. Frank, vice-president of General Marine to the Association and Local 333, which acknowledged receipt of the Memorandum of Agreement, but protested the scope of the Agreement which Frank alleged exceeded the authority given to the Association to negotiate on behalf of General Marine. The letter further stated that General Marine would not bind itself to the terms of the agreement or execute a contract based on these terms.[6]

On April 23, 1976, Local 333 filed an 8(a)(1) and (5) charge against Berman Enterprises, Inc., and its affiliated companies,

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6 The agreement contains the following:

8. Section 1 Application of Agreement

This agreement applies only to all licensed and unlicensed employees employed on tugboats and self-propelled lighters owned or operated by the Employers, a subsidiary company, an affiliated company or a company division in the Port of New York and vicinity.

These last clauses are new.

including, *inter alia*, General Marine (Case No. 2-CA-14240). The charge alleged abrogation of the Association contract and refusal to bargain. This charge was dismissed on June 16, 1976. Basically, the dismissal letter stated that Local 333 was seeking to include in the unit employees not represented by it. Appeal from this refusal to issue complaint was denied on July 23, 1976, by letter stating that the Employer's failure to execute the contract which covered employees never previously considered in the unit did not constitute an unfair labor practice.

With reference to the corporate history, the record established the following facts: Berman Enterprises, Inc., the Employer herein, was established in 1970 primarily to operate vessels separately incorporated. In 1971, the Sam Berman was transferred from General Marine to Berman.[7] In 1973 the Richard K was transferred to Berman. Also in 1973, the Jonathan B was transferred to Berman and thereafter in 1974 sold. These transfers were made apparently to consolidate the non-sludge operations and separate them from the sludge operations.[8] In 1969 the Samantha sank. No tugs have been acquired by General Marine and now it owns and operates the sludge vessel, Susan Frank, and operates another sludge vessel, Rebecca K, which according to the record, is owned by Sludge Tank Cleaning Corp.

It is clear from the record that there is in existence now only three of the vessels referred to in the 1969 letters between General Marine and Local 333; the Susan Frank, Sam Berman, and the Richard K. It also appears that the 1973-1976 Association contract was applied substantially to the crews on the Susan Frank and on the Rebecca K, and that the employees on these vessels were members of Local 333. However, with reference to the vessels the Sam Berman and the Richard K, as well as other vessels operated by Berman, this does not appear

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7 It should be noted that the record reveals that presently this vessel is owned by Watts Ways Towing, Inc.

8 It is unclear from this record whether Local 333 was advised of these transfers.

to be the situation. The evidence establishes that the union-security provision of the 1973-1976 Association contract was not applied to any of the vessels operated by Berman, and presently union and non-union employees as well as members of MEBA work side by side on the various vessels. Additionally certain work rules contained in the 1973-1976 Association contract,[9] were not in fact enforced, and pension and welfare payments were made to the Local 333 fund only for those employees who requested such payments. In further appears that those employees for whom these payments were made are placed on the General Marine rather than on the Berman payroll for convenience only. Moreover, it does not appear hat the grievance and arbitration provisions of the Association contract were applied to the employees on the Berman operated vessels.

In addition to the above, the record establishes that in April 1976 Berman signed a recognition agreement with MEBA covering its employees in a unit of all licensed and unlicensed employees. Local 333 thereafter filed an 8(a)(1)(2) and (3) charge (Case No. 2-CA-14246), alleging assistance by Berman to MEBA. This charge was settled by an informal settlement agreement, entered into and approved on June 30, 1976, by the terms of which, *inter alia*, Berman agreed to withdraw recognition from MEBA until certified.

The record establishes, and the parties do not dispute the fact that all the companies are owned and operated by the Berman family, that labor policy is centrally established, and that a single management is responsible for an integrated operation. However, the record also establishes that General Marine has been a member of the Association for some years, and further establishes that General Marine did authorize the Association to negotiate for it for a new contract listing its vessel the Susan Frank.[10] The Board in *Retail Associates,*

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9 These provisions deal with the manning of vessels and hours worked by the crews.

10 As noted, when the Memorandum of Agreement covering all affiliates and subsidiaries of General Marine was presented to General Marine, it

*Inc.*,[11] held that neither party may effectively withdraw from an established multi-employer bargaining unit except upon adequate written notice given prior to the date set by the contract for modification, or the agreed upon date to begin the multi-employer negotiation. Although protesting the inclusion of other vessels in the unit, the record established that General Marine did not withdraw timely from the Association. Accordingly, I find that the 1976-1979 Association contract is a bar to the petition insofar as the petition purports to include vessels owned or operated by General Marine,[12] including the Susan Frank and the Rebecca K.[13]

Local 333 also contends that the 1976-1979 Association contract is binding not only on General Marine but also on Berman, and is, therefore, a bar to this petition. In support of this contention, Local 333 appears to argue that General Marine and Berman are a single entity for all purposes, and that the execution of the 1976 authorization to the Association to bargain for General Marine is binding on Berman. Local 333, to buttress this argument, alleges that while only General Marine executed the 1973-1976 Association contract in fact,

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refused to execute it contending that authority to negotiate had been extended only for the one vessel. The record does not indicate that General Marine withdrew from the Association in relation to the Susan Frank. Rather, it indicates that the Association contract is being substantially applied to that vessel.

11 120 NLRB 388, 395.

12 The Association contract includes all vessels owned or operated by a member.

13 The record establishes that the Susan Frank and Rebecca K are involved in the disposal of sewerage and waste. General Marine does not use tugs and barges. The two sludge vessels are crewed differently from the Berman vessels, as they each carry two captains, two engineers, and two deckhands, while tugs and tankers carry two captains and an engineer and a deckhand, and barges have one man. Further, deckhands on sludge vessels must be able-bodied seamen, and on tugs and tankers only ordinary seamen are required. Crews on sludge vessels are not interchanged with men on Berman vessels to the extent as occurs in the rest of the fleet, and it appears that these crews are Local 333 members and are hired through that Union.

Berman applied the terms of that contract to vessels operated by it. I find no merit in this contention for the following reasons. The Board has consistently held that to find an employer bound by an association contract there must be evidence that the employer had, in fact, agreed to be so bound.[14] In the instant case it is clear that Berman did not execute any document authorizing the Association to act on its behalf during the 1976 negotiations with Local 333. In fact the only document authorizing the Association to act for it was executed by General Marine, and it was a limited authorization. Nor can Local 333 rely on the argument that Berman had evidenced its desire to be part of the multi-employer Association by its conduct during the life of the 1973-1976 Association contract, because the evidence in the record clearly establishes that Berman did not abide by the terms of the 1973-1976 contract. Furthermore, it is obvious from the record that Local 333 did not enforce that contract with reference to the Berman operated vessels. Thus, Local 333 did not enforce the various provisions with respect to crewing and work rules as well as the union security provisions, and throughout this period Local 333 members have worked side by side with non-union members and with members of MEBA. Accordingly, I find in the circumstances here indicated that the Association contract is not a bar to a petition filed for a unit of all tug, barge and tanker employees employed on vessels operated by Berman,[15] and therefore a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(1) and Section 2(6) and (7) of the Act.

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14 *Moveable Partitions, Inc., 175 NLRB 915: Van Berden Company, 154 NLRB 496.*

15 As set forth above, the Region dismissed a refusal to bargain charge filed by Local 333 based on the refusal by Berman to execute the Association contract. The appeal was denied.

5. In its petition, the Employer seeks an election in a unit of all tug, barge and tanker employees.[15] The parties do not dispute these inclusions and also agree to exclude office clerical employees, dockmen, as well as captains, because the latter are supervisors. As the record supports a finding that captains responsibly direct other employees they shall be excluded.

Berman operates self-propelled barges, sometimes also referred to as tankers, tugs, and barges. These vessels are crewed by employees, categorized as engineers, deckhands and tankermen who are directed by the captains. Though the wage rates differ for the various categories or ratings, all other terms and conditions are the same. All the employees working on vessels operated by the Employer are centrally hired, are transferred by E. Frank to work on vessels as needed, and have the same benefits and work conditions. Though the vessels are separately incorporated they are commonly owned, and a central management is in charge of all aspects of their operation. For many years, the Board has held that a fleet wide unit is the optimum unit,[17] and absent a contrary bargaining history, has found such a unit to be appropriate.

In the instant case MEBA is in agreement with the scope of the unit petitioned for by the Employer. Local 333 contends however that if the petition is not barred by the Association contract, an election should be directed in a unit consisting of two vessels, the Alan Martin and Jane Frank, which are, it alleges, the vessels not traditionally represented by Local 333 and no election should be directed with respect to all other vessels that it has traditionally represented.

As noted above, we have already excluded from any unit found appropriate the two sludge vessels, the Susan Frank and

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16 The lists submitted by the Employer show that the Berman payroll contains 45 employees (12 captains, 10 engineers, 18 deckhands and 5 tugmen), and the General Marine complement is 16 (6 captains, 4 engineers, 6 deckhands).

17 *National Maritime Union of America (Overseas Carriers Corporation) 174 NLRB 216, 221; Moore McCormack Lines, Inc., 139 NLRB 796, 798; Inter-Ocean Steamship Co., 107 NLRB 330.*

Rebecca K, because the crews aboard these vessels are covered by the Association contract.

With reference to all other vessels operated by Berman, this record establishes that only two vessels, the Sam Berman and Richard K, remain of those referred to in the 1969 letter between General Marine and Local 333. However, it also establishes that employees from these two vessels are frequently interchanged with employees from other vessels operated by Berman, and it is clear, that the 1973-1976 Association contract has not been applied to all employees in the agreed upon classification aboard these or other vessels operated by Berman.

In these circumstances, I do not find the past collective bargaining history sufficient to warrant excluding all vessels other than the Alan Martin and the Jane Frank from any election directed herein. Accordingly, I find that the employees employed by Berman to man the various vessels it operates, constitute an appropriate unit and do not include the employees manning the two sludge vessels operated by General Marine in the larger unit.[18]

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Employer to work on its tugboats, barges and tankers including engineers, deckhands, and tankermen, but excluding captains, sludge vessel crews, dockmen, dispatchers, office clerical employees, guards, watchmen and supervisors as defined in the Act.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director for Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to Board's Rules and Regulations. Eligible to vote are those in the unit

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18 *Moore McCormack Lines, Inc., supra.*

who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[19] Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by District No. 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO; or by United Marine Division, Local 333, International Longshoremen's Association, AFL-CIO; or by neither.[20]

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19 In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).* Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address above, on or before December 17, 1976. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

20 Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570. This request must be received by the Board in Washington by December 23, 1976.

Dated: December 10, 1976
at New York, New York

/s/ WINIFRED D. MORIO

Winifred D. Morio
Regional Director
National Labor Relations Board
Region 2
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